

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 24. 112.

CHARLES G. SMITH AND CHARLES G. SMITH, JR.,  
APPELLANTS,

VS.

CHARLES BURNETT, SING ON HIS OWN BEHALF, AND  
SAID CHARLES BURNETT AND CHARLES G. ENDICOTT,  
EXECUTORS OF HARRIET E. BURNETT, DECEASED,  
ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.

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FILED MAY 16, 1897.

(16,590.)

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(16,590.)

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 377.

CHARLES G. SMITH AND CHARLES G. SMITH, JR.,  
APPELLANTS,

*vs.*

CHARLES BURNETT, SUING ON HIS OWN BEHALF, AND  
SAID CHARLES BURNETT AND CHARLES G. ENDICOTT,  
EXECUTORS OF HARRIET E. BURNETT, DECEASED,  
ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.

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5507

# In the Court of Appeals of the District of Columbia

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR, }  
Appellants, } No. 582.  
vs.  
CHARLES BURNETT *et al.*

*a* In the Supreme Court of the District of Columbia.

CHARLES BURNETT *et al.* }  
vs. } No. 379. Admiralty.  
CHARLES G. SMITH *et al.*

UNITED STATES OF AMERICA, } ss :  
*District of Columbia,*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Libel. Filed Dec. 7, 1893.*

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT, Suing on His Own Behalf, and said Charles Burnett and Charles G. Endicott, Executors of the Last Will and Testament of Harriet E. Burnett, Deceased; Jane Eliza Allison, Samuel C. Allison, and Edward S. Allison, Executors of the Last Will and Testament of Michael S. Allison, Deceased; Henrietta W. Allison, Richard C. Washburn, Michael De Motte Vreeland, Charles G. Endicott, on His Own Behalf, and Charles G. Endicott and Mordecai T. Endicott, Executors of the Last Will and Testament of Thomas D. Endicott, Deceased; Drucilla M. Cox, Charlotte A. Rogers, John Van Buskirk, William J. Boothe; Ephraim P. Emson, Executor of the Last Will and Testament of Christian D. Emson, Deceased; William B. Lloyd, Michael Tobin, on His Own Behalf, and Michael Tobin and John Riley, Executors of the Last Will and Testament of Peter J. Connolly, Deceased, Owners of the Schooner "Ellen Tobin" at the

No. 379.  
District Court.

Time of Her Injuries Hereinafter Set Forth,  
 Except that said Peter J. Connolly was One of  
 said Owners, and that He has Since said In-  
 2 injuries, to wit, in September or October, 1893,  
 Departed this Life Testate and Leaving said  
 Libellants, Michael Tobin and John  
 Riley, His Executors, as the Owners of  
 the Right to Sue for His Share to the  
 Injuries to said Schooner,  
 vs.  
 CHARLES G. SMITH and CHARLES G. SMITH,  
 JUNIOR.

To the honorable the supreme court of the District of Columbia,  
 holding the district court in admiralty:

The libel of Charles Burnett, suing on his own behalf, and said  
 Charles Burnett and Charles G. Endicott, executors of the last will  
 and testament of Harriet E. Burnett, deceased; Jane Eliza Allison,  
 Samuel C. Allison, and Edward S. Allison, executors of the last will  
 and testament of Michael S. Allison, deceased; Henrietta W. Alli-  
 son, Richard C. Washburn, Michael De Motte Vreeland, Charles G.  
 Endicott, on his own behalf, and Charles G. Endicott and Mordecai  
 T. Endicott, executors of the last will and testament of Thomas D.  
 Endicott, deceased, all of the State of New Jersey and resident in  
 Jersey City, in said State, and Drucilla M. Cox, of New York State,  
 and Charlotte A. Rogers, of Milwaukee, Wisconsin, and John Van  
 Buskirk, of Sessex county, Connecticut, and William J. Boothe, of  
 Virginia; Ephraim P. Emson, of Collier's Mills, in the State of Vir-  
 ginia, executor of the last will and testament of Christian D. Em-  
 son, deceased; William B. Lloyd, Michael Tobin, on his own behalf,  
 and Michael Tobin and John Riley (all of New York State), execu-  
 tors of the last will and testament of Peter J. Connolly, deceased,  
 owners of the schooner "Ellen Tobin" at the time of her injuries  
 hereinafter set forth, except that said Peter J. Connolly was one of  
 said owners, and that he has since said injuries, to wit, in Septem-  
 ber or October, 1893, departed this life testate and leaving said libel-  
 lants Michael Tobin and John Riley, his executors, as the  
 3 owners of the right to sue for his share of the injuries to said  
 schooner, of which John Hankins is, or lately was, master,  
 exhibit this their libel against Charles G. Smith and Charles G.  
 Smith, Junior, in their own right and in a cause civil and maritime  
 of tort or damages from injuries, and therefore the said libellants  
 allege and articulately propound as follows:

1. That libellants are all citizens of the United States and resi-  
 dent as aforesaid; that said schooner "Ellen Tobin" is a vessel  
 of five hundred and seventy-five (575) tons burden, or thereabouts,  
 for sea service, but her burden for inside navigation is much  
 greater, and she is registered at four hundred and thirteen and  $\frac{61}{100}$   
 (413.61) tons, and at the time when the cause of action hereinafter  
 mentioned and set forth arose was enrolled and licensed for the  
 coasting trade in the custom-house at New York, in the State of



New York, and was employed in the business of commerce and navigation between ports and places in different States of the United States.

2. That on or about the 2d day of August, A. D. 1893, the aforesaid schooner, being light, staunch, well manned, and provided, sailed from Fort Washington, on the Potomac river, for the port of Georgetown, in the District of Columbia, for the purpose of there being loaded under an oral contract or oral charter made with the said Charles G. Smith and Charles G. Smith, Junior, by her master, one Captain John Hankins, with about six hundred tons of crushed stone, which was by the terms of said contract to be loaded by the said Charles G. Smith and Charles G. Smith, Junior, at a certain wharf in Georgetown aforesaid, which said wharf was then and there leased by said Charles G. Smith and Charles G. Smith, Junior, together with the water rights and berth connected therewith, then and there being the lessees in possession of said wharf and water rights and berth connected therewith and taken to Fortress Monroe, in the State of Virginia, and there unloaded by the said Charles G. Smith and Charles G. Smith, Junior. The lease under

4 which said Smiths hold said wharf is duly recorded in Liber 1573, at folio 179, of the land records of the District of Columbia, and a certified copy thereof is herewith filed and made part of this libel and marked "Libellants' Exhibit A."

For the service of taking said stone as aforesaid the libellants were to receive the price of fifty cents per ton.

Said vessel was then and there, at the time of said oral charter and until injured as hereinafter set forth, seaworthy and staunch and suitable for the service aforesaid.

3. That in accordance with said oral charter, as made by one Joseph H. Lee on behalf of said Smiths, said vessel was by her master and crew towed to the said port of Georgetown, and when she there arrived and after her said master had first made full and all proper inquiry of the foreman of said wharf as to what depth of water the berth in front of said wharf contained, and after the said master had been informed by said foreman that it contained  $14\frac{1}{2}$  or 15 feet of water at low tide, the said master, then and there knowing that when said vessel was loaded to her fullest capacity she did not draw more than  $14\frac{1}{2}$  feet of water aft and  $13\frac{1}{2}$  feet forward, continued through said Smiths and their foreman and employees to load said vessel, a lighter being first interposed between said wharf and said vessel by said foreman to keep her breasted out from said wharf, so that a certain chute which ran from the stone elevator on said wharf could be passed down and into the said schooner for the purpose of loading her with such stone.

4. That said Smiths, through their foreman and workmen, then and there proceeded to load said vessel and began loading her in the after part thereof, and assisted said master in shifting her back and forth while she was being so loaded, and continued her loading until some 400 tons of stone had been loaded on her, and that they continued to so load her until the afternoon of Saturday, the 5th day of August, when about that amount of stone had been

loaded on her, and said foreman of said Smiths then and there for the first time informed said master that it would be necessary before further loading her to further breast her off by interposing another lighter on Monday between her and said wharf, although there was plenty of water in said berth, and that by reason of the careless, negligent, unskillful, and improper management of the berth in front of said wharf by the said Smiths as leased by them and used as aforesaid, and only on account of and by reason of said negligence and want of care of said Charles G. Smith and Charles G. Smith, Junior, and their agents, the same had been permitted to remain filled up with a natural rock, stones, or some other obstruction, so that said berth at said wharf did not contain a sufficient depth of water to even float said vessel in her then not much more than half-loaded condition, and when she was then not drawing more than twelve feet ten inches at her deepest point, and that when said quantity of stone had been loaded on her as aforesaid it caused her to touch something, being such obstruction at the bottom of said berth, and upon said master making inquiry of said foreman of said Smiths why she tipped forward he was informed by said foreman that she was all right; that it was owing to the way she was loaded forward, but nevertheless so it is that the bottom of said berth in front of said wharf was filled with a natural rock, stones, or other obstructions which had negligently been allowed to remain in said berth at its bottom by said Smiths, which caused said vessel to break her back by reason of said natural rock, stones, or obstructions coming in contact with the bottom of said vessel by reason of the careless, negligent, unskillful, and improper management of said wharf and the berth thereof by said Smiths and their agents

in not keeping said berth free from obstruction, as said  
 6 Smiths were in duty bound to do, and said schooner has become a total loss by reason thereof; that the loss and injuries aforesaid were caused by the said negligence and want of proper care on the part of said Charles G. Smith and Charles G. Smith, Junior, and their agents, and not from any omission or neglect on the part of said vessel, the "Ellen Tobin," her owners or master or crew.

5. That said schooner "Ellen Tobin," originally cost \$32,000 to build her, and was at the time immediately preceding said injury of the value of \$10,000, and that by reason of the improper, careless, negligent, and unskillful management of said wharf and berth as aforesaid by said Smiths of the injury thereby occasioned to these libellants as her owners the libellants have sustained damages and loss in said sum of \$10,000, as herein specified to the extent and amount of \$10,000, and also to the extent in addition thereto of \$1,240, which has been paid by libellants for pumping the crushed stone out of her, so that her injuries might be ascertained and that she could be raised and taken out of navigable water, as required by the law maritime as well as the statute.

6. That owing to the fact that her owners were scattered throughout the country, many of them being at the recent Chicago Exposition, it required some time to bring them together to determine

what to do with said vessel, and when they were finally brought together, and after counsel had advised them that it was necessary and proper to have a survey of the said vessel as soon as the crushed stone which was in her could be moved, so that said vessel could be examined by experts in order to ascertain whether it would pay to repair said vessel for not, your libellants sent to the various wrecking companies in the country to have them make bids to take out said crushed stone and raise said vessel, but so it is that, owing to the recent severe storms along the Atlantic coast and the fact

7 that in consequence thereof all the said wrecking companies and wreckers generally were busily engaged in saving vessels at that time, and that this port is so far removed from all the facilities for raising and repairing vessels, the several companies seemed loath to bid for said employment, and the lowest bid procured by the libellants was that of French & Cole, wreckers, of Norfolk, Virginia, of \$8,000 for removing the crushed stone in her and raising said vessel; and libellants, being loath to pay such a large sum for such work and having in contemplation the fact also that in addition to such expense it would probably require an equal sum to repair said vessel after being raised, determined that as either they or the said Smiths would have eventually to pay such enormous sums of money they would endeavor to get some one to try to first remove said stone so that the real condition of said vessel might be ascertained by a survey of expert men, and consequently they made first a conditional contract with one John B. Lord to bring up a steam sand dredge and pump which he then had down the Potomac river at or near Quantico, Virginia, and agreed with him that in case he, said Lord, would remove the stone they would pay him the sum of \$800, but said Lord, after pumping several days, threw up said contract after getting out about one hundred tons of said stone, and that thereafter your libellants then made a contract with said Lord that he should remove said stone for the sum of \$1,200, which after three weeks' pumping he succeeded in finally accomplishing; and your libellants then paid him, said Lord, said sum of \$1,200 and have since paid the sum of \$40 for handling said stone as removed under a contract filed herewith and marked "Libellants' Exhibit B" and made part hereof.

That immediately thereafter a survey was called at the solicitation of the master of said vessel and your libellants, by the custom-house authorities, as is usual in any part where there is no port warden, of which survey said Charles G. Smith and Charles G.

8 Smith, Junior, were given two days' notice by said authorities, and Park Agnew, Esq., one of the owners of the only shipyard on this river, and two expert men, one William H. Kenzel, from Jersey City, New Jersey, and William Gokey, from Brooklyn, New York, were appointed as surveyors, and the survey of said vessel was then, on the 1st day of November, 1893, held. A certified copy of said survey is herewith filed and marked "Libellants' Exhibit C" and made part of this libel and prayed to be considered at any hearing hereof; that the result of said survey was that said vessel was found unseaworthy and incapable of repairs

and was condemned to be sold, and that in consequence said vessel after due advertisement for the space of twelve days in the Evening Star newspaper was on the 14th day of November, 1893, offered for sale, at public auction, at 12 o'clock m. of that day, and your libellants, as owners, being then and there the highest bidders, said vessel was knocked down and sold to them for the sum of \$25.00, she being then and there incapable of repairs; and that said Smiths had full, due, and timely notice of the time and place of said sale, namely, six days' notice thereof, and said Charles G. Smith, Junior, was present thereat; and your libellants, being compelled to raise her, on the following day entered into an agreement in writing, a duplicate whereof is hereto annexed and made part hereof and marked "Libellants' Exhibit D," with said John B. Lord, who is engaged in the sand business at this place, that in consideration of \$100 paid libellants by said Lord, he, said Lord, should raise said vessel and after raising her said vessel should belong to him; that said Lord has since raised said vessel, and she now lies sunk out of navigable water and away from said wharf; that all of the proceedings in this paragraph mentioned were had and done in good faith and for the purpose of sparing expense to the parties eventually responsible for the injury to said vessel, and that libellants

9 are willing to credit the difference between what they paid for said vessel and what they sold her — to said Lord, viz., \$100, after deducting the expense of advertisement, &c., amounting to \$28.00.

7. That at the time of the loss (injury) to said schooner Ellen Tobin the libellants were the true and lawful owners of the said schooner, "except that said Peter J. Connolly was then one of said owners, and that he has since said injury, to wit, in September or October, 1893, departed this life testate, and by his last will and testament appointed said libellants, Michael Tobin and John Connolly, executors of said last will and testament, who have duly qualified as such and as such executors thereupon became and now are the owners of the right to sue for his, said Connolly's, share of the injury to said schooner."

This clause is added by consent order to paragraph 7th of the libel.

That said schooner was nineteen years old (having been built in the year 1874) and at the time of her injury was of the value of ten thousand dollars, and that, owing to and by reason of the carelessness, negligent, unskillful, and improper management of the said wharf and berth aforesaid by said Smiths and their agents, the libellants have sustained damages and losses, as herein specified, to the extent of \$15,000 or thereabouts, for which libellants claim reparation in this suit, together with costs and necessary expenses thereof.

8. That all and singular the premises are true and within the maritime jurisdiction of this honorable court.

Wherefore libellants pray that process in due form of law may issue against Charles G. Smith and Charles G. Smith, Junior, and that this honorable court will pass a decree against said Charles G.



Smith and Charles G. Smith, Junior, *in personam*, to be paid with costs, and for such other and further relief and redress as to right and justice may appertain and the court is competent to give.

JOHN HANKINS, *Master*.

CHARLES BURNETT AND

CHARLES BURNETT AND

CHARLES G. ENDICOTT,

*Executors of Harriet E. Burnett ;*

JANE ELIZA ALLISON,

SAMUEL C. ALLISON, AND

EDWARD S. ALLISON,

*Executors of Michael S. Allison ;*

HENRIETTA W. ALLISON,

RICHARD C. WASHBURN,

MICHAEL DE MOTTE VREELAND,

CHARLES G. ENDICOTT, AND

CHARLES G. ENDICOTT AND

MORDECAI T. ENDICOTT,

*Executors of Thomas D. Endicott ;*

DRUCILIA M. COX,

CHARLOTTE A. ROGERS,

JOHN VAN BUSKIRK,

WILLIAM J. BOOTHE ;

EPHRAIM P. EMSON,

*Executor of Christian D. Emson ;*

WILLIAM B. LLOYD,

MICHAEL TOBIN, AND

MICHAEL TOBIN AND

JOHN RILEY,

*Executors of Peter Connolly,*

Per CHARLES G. ENDICOTT,

*Owners of Schooner Ellen Tobin.*

RANDALL HAGNER,

*Proctor for Libellants.*

DISTRICT OF COLUMBIA, *set :*

Before me, Henry R. Elliott, a United States commissioner, this day personally appeared John Hankins, late master of the schooner Ellen Tobin and made oath that the matters and things stated in the annexed libel of his own knowledge are true and such as are stated therein as matters of belief he believes to be true.

JOHN HANKINS, *Master*.

Sworn to — subscribed before me this 29 day of November, A. D. 1893.

[SEAL.]

HENRY R. ELLIOTT,  
*U. S. Comm'r for the Dist. of Col.*

## LIBELLANTS' EXHIBIT A.

Filed Dec. 7, 1893.

Liber No. 1573, fol. 179 *et seq.*

Potomac Stone Co.	}	Recorded April 13th, 1891—9 a. m. Lease.
to		
Charles G. Smith <i>et al.</i>		

This indenture of lease made this 11th day of April, in the year of our Lord one thousand eight hundred and ninety-one, A. D. 1891, by and between the Potomac Stone Company a corporation duly incorporated under the laws of the State of Virginia, party of the first part and Charles G. Smith and Charles G. Smith, Junior of the District of Columbia parties of the second part, witnesseth, that the party of the first part has leased, demised and to farm let and by these presents does hereby lease, demise and to farm let unto the said parties of the second part, their executors, administrators and assigns all the following real estate situate in Georgetown in the District of Columbia, being lot eighteen (18) and parts of lots seventeen (17) and nineteen (19) of the water lots in Georgetown in the District of Columbia beginning for the same at the end of two hundred and twenty-three  $\frac{4}{10}$  feet measured westwardly on the south line of Water street from its intersection with the west line of High street and running thence westerly by and with the south line of Water street seventy-six  $\frac{2}{10}$  feet to an alley; thence southerly and parallel to High street and of that width to the channel of the Potomac river being in square (5) in the city of Georgetown, District of Columbia, and being the same property conveyed by Mary Julia Foertsh and husband to the Potomac Stone Company by deed dated the sixth (6) day of December, 1890, and recorded in the land records of the District of Columbia, in Liber 1544 folio 234. To have and to hold the said above mentioned and described premises with the appurtenances unto the said parties of the second part, their executors, administrators and assigns from the 1st day of

12 January, 1891, for and during and until the full end and term of ten years thence next ensuing, and fully to be completed and ended yielding and paying therefor to the party of the first part or its assigns the sum of six hundred and seventy-nine dollars and forty-seven cents (\$679.47) payable in two equal one-half yearly payments on the 15th of April and the 15th day of October, in each year; the first payment to be made on the 13th day of April, 1891, and also paying all taxes and assessments of every sort, kind and description upon the premises hereby demised, provided always nevertheless, that if the yearly rent above reserved or any part thereof shall be behind or unpaid on any day of payment whereon the same ought to be paid as aforesaid, or if default should be made in any of the covenants herein contained on behalf of the parties of the second part their executors administrators and assigns to be paid, kept and performed then and from thence henceforth it shall be lawful for the said party of the first part or its assigns in,

to, and upon the demised premises, and every part thereof wholly to re-enter and the same to have again be possessed and enjoy as in its or their first and former estate anything hereinbefore contained to the contrary thereof in anywise notwithstanding, and the said parties of the second part for themselves and each for himself his executors, administrators or assigns doth covenant and agree with the party of the first part and its assigns by these presents that they and each of them their and each of their executors, administrators or assigns shall and will during the term hereby granted well and truly pay unto the party of the first part or its assigns the said yearly rent above reserved on the days and in the manner limited and prescribed as aforesaid, and that they shall and will also pay and discharge all taxes and assessments of whatsoever kind upon or against the said premises which may be charged assessed and imposed during the continuance of this term, and that they will keep in

13 good repair all the buildings and improvements now upon the said demised premises and return the same in good repair at the termination of this lease, ordinary wear and tear excepted, and that on the last day of the said term or the sooner determination of the term hereby granted they shall and will peaceably and quietly leave, surrender and yield up unto the party of the first part or its assigns all and singular the said demised premises save and except the stone crusher, engine and boiler, and all other appurtenances thereto are now on said premises which are now and shall remain the property of the parties of the second part.

In witness whereof, the said party of the first part has caused these present to be signed by the president and its corporate seal to be hereunto annexed, and does hereby constitute and appoint Benjamin H. Warder its true and lawful attorney for it and in its name to acknowledge and deliver these presents as the act and deed of the said party of the first part on the day and year first above written, and the said parties of the second part have hereunto set their hands and seals on the day and year first above written.

BENJAMIN H. WARDER, [SEAL.]

*President Potomac Stone Co.*

CHARLES G. SMITH.

CHAS. G. SMITH, JR.

[SEAL.]  
[SEAL.]

Witness:

G. M. FAGUE.

R. HENRY PHILLIPS,

*Sec'y Pot. Stone Co.*

[Corporate Seal.]

DISTRICT OF COLUMBIA, *To wit:*

I, G. M. Fague, a notary public in and for the District aforesaid, do hereby certify that Benj. H. Warder, personally well known to me as the attorney-in-fact in the foregoing indenture of lease from the Potomac Stone Company to Charles G. Smith and Charles G. Smith,

14 Junior, bearing date on the 11th day of April, A. D. 1891, and hereunto annexed, personally appeared before me in the District aforesaid, and by virtue of the authority therein and thereby confirmed acknowledged the same to be the act and deed of the said Potomac Stone Company; and I do also further certify that Charles G. Smith and Charles G. Smith, Junior, personally well known to me as the persons named in the foregoing indenture of lease bearing date on the 11th day of April, A. D. 1891, and hereunto annexed, personally appeared before me in the District aforesaid and acknowledged the same to be their act and deed.

Given under my hand and notarial seal this 11th day of April, A. D. 1891.

[NOTARIAL SEAL.]

G. M. FAGUE,  
Notary Public.

We, the undersigned, being owners of all the stock of the Potomac Stone Co., ratify and approve the above lease.

BENJAMIN H. WARDER,	owner of	450	shares.
CHARLES G. SMITH,	" "	440	"
ROBERT A. PHILLIPS,	" "	70	"
H. HENRY PHILLIPS,	" "	30	"
C. G. SMITH, JR.,	" "	10	"

[Corporate Seal.]

(Endorsed.)

Fee, \$2.25.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1573, fol. 179 *et seq.*, one of the land records of the District of Columbia.

Office of recorder of deeds, Washington, D. C., December 2, 1893.

GEO. F. SCHAYER,  
Dep. Recorder of Deeds.

15

LIBELLANTS' EXHIBIT B.

Filed Dec. 7, 1893.

We hereby agree with the owners of the schooner Ellen Tobin to accept from them the stone now lying in said schooner opposite our wharf in Georgetown and waive any claim we might otherwise have against said owners or said boat for damages to said stone by being covered with mud and water, provided said stone shall be taken out of said boat and delivered upon our scows and provided we are paid \$40 for work of loading from scows into our buckets for hoisting.

This is without prejudice to any claims we may have against said owners or boat for other damage to us by reason of the failure of said boat to comply with the contract to carry stone for us to Fortress Monroe or by reason of its being sunk and left opposite our wharf.

And without prejudice to the rights of the owners of said schooner



for any claims they may have against us arising from her being sunk, said sum of \$40 to be considered as one of said claims, as well as the expense of raising said boat.

September 23, 1893.

CHARLES G. SMITH & SON.

Witnessed by—  
JOB BARNARD.

16

LIBELLANTS' EXHIBIT "C."

Filed Dec. 7, 1893.

DISTRICT OF COLUMBIA, }  
Port of Georgetown, } *set* :

I, Louis P. Seibold, deputy collector and notary public in and for said District, do hereby certify that Park Agnew, William H. Kenzel, and William Gokey, being this day personally made known to me and being first duly sworn on the Holy Evangely of Almighty God, did depose and say :

We, having been appointed to hold a survey of the schooner "Ellen Tobin," now lying sunk on an obstruction in the berth in front of the wharf near the foot of High street, in this port, do solemnly swear that we will make a true survey of the condition of said schooner and report the same in a paper to be annexed hereto, and we will also report therein whether the condition of said schooner justifies her repair and whether in our judgment the same should be repaired or be condemned and sold for account of the owners thereof and whom it may concern.

We further swear that we have no interest whatever in said schooner or anything thereon or connected therewith.

PARK AGNEW.  
WM. H. KENZEL.  
WM. GOKEY.

Sworn to and subscribed before me this 1st day of November, A. D. 1893.

[SEAL.]

LOUIS P. SEIBOLD,  
*Deputy Collector and Act'g  
Appraiser and Notary Public.*

17

DISTRICT OF COLUMBIA,  
PORT OF GEORGETOWN, Nov. 1st., 1893.

We, the subscribers, having been required thereto by the owners and John Hankins, master of the schooner "Ellen Tobin," and being first duly sworn to make a true survey of her condition by Louis P. Seibold, deputy collector and act'g appraiser of the port of Georgetown and notary public, the said undersigned, Park Agnew, being part owner of a shipyard in Alexandria, Va., and familiar with building and repair of vessels, and the said undersigned, William Gokey, being a ship carpenter from Brooklyn, New York, and operating a shipyard there, and the said undersigned, William

H. Kenzel, a sail-maker and extensive vessel-owner, who has rebuilt and repaired many vessels as managing owner, did this day survey said vessel as she now lies sunk on a rock or some obstruction near the foot of High street, in said Georgetown, it being now a low tide, and did survey her condition and found her decks cut through in many places for the purpose of pumping out the crushed stone which is piled alongside near the wharf, and we found her upper deck three feet above the level of the water in the river Potomac. The obstruction in the bottom of the berth in front of the wharf had forced up her false keel or shoe and her keel and keelson and floor timbers; her keelson was broken for the distance of at least twenty feet, or, in nautical terms, her backbone was broken; her main mast was forced up by such obstruction a distance of at least three feet above its former position, so as to break her shrouds. In the process of breaking her keelson her centre-board well has been raised throughout its whole length a distance of about twenty-six feet.

Owing to the injury thus suffered by said schooner "Ellen Tobin," we are unanimously of the opinion that the necessary repairs to her would cost more than she would be worth afterwards;

neither of us, if she was placed on the ways or railway, would  
18 take her as a gift and repair her, and that it would be for the interest of all concerned that she should be condemned

as unseaworthy and unworthy of repairs. We do therefore condemn said schooner "Ellen Tobin" as unseaworthy and unworthy of repair, and we therefore do hereby order and direct that the aforesaid damaged schooner be sold at public auction for account of the owners or whomever the same may concern; and we further certify and swear that we have no interest whatever in said schooner and are not related to her owners or any of them and have no interest in anything thereon or connected therewith.

In testimony whereof we hereunto subscribe our names this first day of November, A. D. 1893.

PARK AGNEW.  
W. H. KENZEL.  
WM. GOKEY.

DISTRICT OF COLUMBIA, *set*:

PORT OF GEORGETOWN, U. S. CUSTOM-HOUSE.

Before me this day personally appeared Park Agnew, William H. Kenzel, and William Gokey, who, being first duly sworn on the Holy Evangelist of Almighty God to tell the truth, the whole truth, and nothing but the truth, did make oath the statements contained in the above survey of the schooner "Ellen Tobin" and subscribed by them are true.

PARK AGNEW.  
W. H. KENZEL.  
WM. GOKEY.

Sworn to and subscribed to before me this first day of November,  
A. D. 1893.

[SEAL.]

LOUIS P. SEIBOLD,  
*D'y Coll. and Act'g Appr., Notary Public.*

19

LIBELLANTS' EXHIBIT "D."

Filed Dec. 7, 1893.

Duplicate.

WASHINGTON, D. C., Nov. 15th, 1893.

For and in consideration of one hundred dollars to me in hand paid by John B. Lord I, as managing owner of the schooner "Ellen Tobin," on behalf of myself and the other owners thereof, do hereby agree to see to said John B. Lord said schooner as soon as she is raised and removed from navigable water and away from the berth where she now lies sunk on a rock or other obstruction in a berth near the foot of High street, Georgetown, D. C., said ship's papers to be turned over to said Lord when she is raised, together with a bill of sale.

CHAS. G. ENDICOTT,  
*Man'g. Owner Sch'r Ellen Tobin.*

*Citation. Issued Dec. 7, 1893.*

In the Supreme Court of the District of Columbia, the 7th Day of December, 1893.

CHARLES BURNETT <i>et al.</i> , Libellants,	} In Admiralty. No. 379.
<i>vs.</i>	
CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR, Defendants.	

The President of the United States to the United States marshal for said District, Greeting:

You are hereby commanded to warn the defendant- in the above-entitled cause to appear before the district court of the United States for the District of Columbia on the 26th day of Dec'r, 20 1893, at 10 o'clock in the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, to answer the libel in said cause.

And if *he* cannot be found attach defendants' goods and chattels to the amount sued for, to wit, —, and hold the same subject to the order of the court.

Or, if such property cannot be found, attach the defendants' credits and effects to said amount, in whosoever hands the same may be found, and warn the person or persons in whose hands you find such credits and effects to appear before said court on the first day of jurisdiction after such attachment by — o'clock noon of said day, then and there to answer, upon oath or affirmation, as to the debts, credits, or effects of the defendant- in his hands and to such interrogatories touching the same as may be propounded by the

libellant; and have then there this writ so indorsed as to show how you have executed the same.

Witness E. F. Bingham, chief justice of said court.

J. R. YOUNG, *Clerk*,

By L. P. WILLIAMS, *Ass't Clerk*.

*Marshal's Return.*

Summoned and warned the within-named Charles G. Smith and Charles G. Smith, Junior, Dec'r 7, 1893.

D. M. RANSELL, *Marshal*.

21

*Appearance of Respondents.*

Dist. Court.

BURNETT <i>et al.</i> , Libellants,	} No. 379.
<i>vs.</i>	
SMITH <i>et al.</i> , Respondents.	

1893, DEC. 8.

Please enter our appearance for the respondents.

EDWARDS & BARNARD.

Appearance, as ordered, entered.

'93, 12, 8.

*Answer. Filed Dec. 26, 1893.*

In the Supreme Court of the District of Columbia, Holding a District Court of the United States for the District of Columbia.

CHARLES BURNETT, Suing on His Own	} In Admiralty. No. 379.
Behalf, and Others, Owners of the	
Schooner Ellen Tobin, Libellants,	
<i>vs.</i>	
CHARLES G. SMITH and CHARLES G.	
SMITH, JR.	

And now comes Charles G. Smith and Charles G. Smith, Jr., and for answer to the libel of Charles Burnett, suing on his own behalf and on behalf of other owners of the schooner Ellen Tobin, and of other owners of said schooner, against whom the said Charles

22 G. Smith and Charles G. Smith, Jr., do allege and propound as follows:

1. These respondents neither admit nor deny the citizenship and residence of the libellants nor the tonnage, registration, enrollment, license, and employment of said schooner as alleged in the first article of the libel, but require the libellants to make proof thereof.

2. These respondents have no knowledge of the sailing of said schooner on the second day of August, 1893, from Fort Washington, on the Potomac river, for the port of Georgetown, in the District of Columbia, or that at the time of sailing the said schooner was

light, staunch, well manned, and provided as alleged in the second article of said libel.

They deny that at or prior to the alleged date of the sailing of said schooner from Fort Washington they made any oral contract or charter for the loading of said schooner, as charged in the said second article of said libel.

They admit that at the time aforesaid the respondents were the lessees of the wharf described in said second article of the libel and were in possession thereof, and that the copy of the lease under which they held possession of said wharf, filed with said libel, is a true copy of the original lease.

They deny that from the time the said schooner is alleged to have sailed from Fort Washington until she was injured in the manner charged in said libel she was seaworthy, staunch, and suitable for the service mentioned in said second article of said libel.

3. These respondents admit that the said schooner was towed to Georgetown by her master and crew; but they deny that the same was done in accordance with any oral charter made on behalf of these respondents, as alleged in the third article of said libel.

They deny that after the arrival of said schooner at Georgetown her said master made full and proper inquiry or any inquiry  
23 whatever as to what depth of water the berth in front of said wharf contained.

They deny that the foreman of these respondents at the time aforesaid or at any time informed the master of said schooner that the said berth in front of said wharf contained fourteen and a half or fifteen feet of water at low tide or any other number of feet.

They admit that after the arrival of said schooner at said wharf the work of putting — on board said schooner was begun and carried on by these respondents, but they alleged that the storage of the same and the quantity placed on board and the distribution thereof in the hold of said vessel were under the sole direction of the said master.

They admit that a lighter was interposed between said wharf, and said schooner to keep said schooner breasted oot from said wharf so that a certain chute for the conveyance of stone from the crushers could be passed down and into said schooner for the purpose of loading said schooner.

4. These respondents admit that the loading of said schooner with crushed stone was proceeded with, the respondents putting the stone on board and the said master directing where and how the same should be stored, and that the loading was begun by placing stone in the after-part of said schooner under the direction of said master, and that the respondents assisted in shifting said schooner back and forth while she was being loaded under the direction of said master, and that the loading was continued as aforesaid until about five o'clock in the afternoon of Saturday, August 5, 1893.

They deny that when said quantity of stone had been loaded as aforesaid or on the Saturday afternoon aforesaid or at any other time the foreman of the said respondents for the first time informed the said master that it would be necessary before further



- 24 loading her to further breast her off by interposing another lighter on Monday between her and said wharf, although there was plenty of water in said berth.

They deny that at the time aforesaid or at any time the said foreman informed the said master that by reason of the careless, negligent, unskillful, and improper management of the berth in front of said wharf by these respondents the same had been permitted to remain filled up with a natural rock, stones, or some other obstruction, so that the said berth at said wharf did not contain a sufficient depth of water in her then condition, and that the stone then on board caused said schooner to touch something being at the bottom of said berth.

They deny that the said master at the time aforesaid or at any time made inquiry of said foreman why said schooner tipped forward.

They deny that said foreman made reply to said inquiry of said master that said tipping was caused by the way said schooner was loaded.

They deny that the bottom of said berth in front of said wharf was filled with a natural rock, stones, or other obstruction which had negligently been allowed to remain in said berth at its bottom by these respondents, and that the back of said schooner was broken by reason of said natural rock, stones, or obstruction coming in contact with the bottom of said vessel through the careless, negligent, unskillful, and improper management of said wharf and berth by the respondents in not keeping said berth free from obstructions; and they deny that the said schooner became and is a total loss to the libellants by reason of the respondents' alleged carelessness, negligence, unskillful and improper management.

- 25 5. These respondents say that they have no knowledge or information as to the original cost of the said schooner, and neither admit nor deny her value, as stated in the fifth article of said libel, and require proof thereof.

They deny that at the time immediately preceding said injury the said schooner was of the value of \$10,000.

They deny that by reason of the improper, careless, negligent, and unskillful management of said wharf and berth by these respondents the libellants have sustained damages and loss in the sum of \$10,000, and to the extent, in addition, of \$1,240 alleged to have been paid by libellants for pumping the crushed stone out of said schooner, as alleged in the fifth article of said libel.

6. These respondents say, in respect of the averments made in the sixth article of said libel in explanation and excuse for their long delay in attempting the salvage of said schooner and to prevent her loss, they have no knowledge, and neither admit nor deny the same, but require the libellants to make proof thereof.

The alleged survey referred to in said article was made three months after the alleged injury to said schooner was occasioned as aforesaid, and is in no way binding on these respondents or entitled to consideration in determining the cause of said injuries or the respondents' liability for the same.

The respondents have no knowledge of the contract alleged in the sixth article of the libel to have been made with the said Lord or of the sale alleged to have been made to him, and require strict proof thereof.

7. These respondents say that they do not know, and therefore cannot admit or deny, that at the time of the alleged loss of or injury to said schooner the libellants were the true and lawful owners of said schooner, and they require proof thereof.

26 They deny that owing to or by reason of the careless, negligent, unskillful, and improper management of said wharf and berth by the respondents the libellants have sustained damages or losses to the extent of \$15,000 or any other sum of money.

8. These respondents, further answering, say that they had no knowledge or notice of the existence of any dangerous obstruction or of any natural rock or broken stone at the bottom of said berth or dock of such a character as to threaten or cause injury to any vessel grounding or settling in said berth or dock; that they had caused said dock to be dredged in the spring of 1893, and had exercised proper and usual care in making said berth or dock a safe place for the loading of vessels.

9. These respondents, further answering, say that on or about the 2nd day of August, 1893, an agreement was entered into by and between these respondents of the one part and the said master of the said schooner Ellen Tobin of the other part whereby the said master agreed to receive at the aforesaid wharf in Georgetown and to convey from Georgetown to Fort Monroe, Virginia, a cargo of crushed stone at and for the compensation of fifty cents per ton for freight.

The number of tons to constitute the cargo was not agreed upon, but was left to the determination of the said master in the exercise of his discretion.

There was not in said oral agreement or in any agreement at any time made between the libellants and these respondents any guaranty, representation, or assurance by the respondents to the said master that the berth in front of said wharf contained fourteen and a half or fifteen feet of water at low tide or any other number of feet, and the position of said schooner at said wharf and the time

27 and manner of receiving said cargo and storing the same, as well as the quantity to be received, were under the exclusive direction and control of the said master.

Said schooner arrived at said wharf on the afternoon of Wednesday, August 2, 1893, and the work of loading said cargo was proceeded with, the respondents delivering crushed stone and the captain storing the same according to his own judgment, said schooner being moved forward and back as directed by the said master, with the assistance of the employes of these respondents.

On Friday, the fourth day of August, 1893, the said schooner being then partly loaded, one of these respondents, Charles G. Smith, Jr., said to the said master that it would be wise for him to sound around his vessel and make sure that she was lying all right; that it was usual for captains to look out for their own vessels and their

position at the wharf, and that, although the said berth or dock had been dredged out in the early part of that year, the respondents did not know just what the bottom was, although they thought it was all right; that he would advise the master to sound and satisfy himself as to the depth of water, and that respondents would give directions to their men to carry out any instructions the said master might give as to loading or not loading, and that they would aid the said master in shifting the position of said schooner if he considered any change necessary.

The loading of said schooner proceeded under the direction of said master until about 5 o'clock on Saturday afternoon, August 5th, at which time, the tide being nearly low, the master said he was touching bottom slightly, and thereupon the work of loading ceased and was not resumed.

The said master then said that he was lying all right, and that he would shove his vessel off on the high water, the tide being high at about midnight.

28 The respondents, by their foreman, there and at that time advised and urged the said master to shove said schooner off at high tide, and when he so shoved her off to place another scow between said schooner and the wharf, and the said foreman prepared and placed in position another scow to be placed between the said schooner and the scow, then being next to said wharf, and informed the master that if any more stone were taken on board it could be wheeled over the two scows.

The master thereupon declared that he would shove said vessel off at high tide and would place said scow between said schooner and said scow then at said wharf, and requested that the iron chute which carried the stone to said schooner should be removed in order that said schooner might be shoved off, and this was accordingly done by the respondents' employees.

At that time the said master said that said schooner was leaking.

The tide was high at said wharf at about midnight as aforesaid on that night, the night of Saturday, August 5th, and said schooner was then afloat, but no effort was made by the said master to shove her off and further away from said wharf and scow or to interpose said other scow between said schooner and said scow then next to said wharf, nor was any effort made during said night of Saturday to pump the water from said schooner or to stop the entrance of water into her hold or to ascertain her position, or to protect her from injury by leakage and the consequences thereof.

Pumping was begun about half past eight o'clock on Sunday and was continued for some hours, but said schooner continued to sink slowly and steadily until about noon on Sunday, and pumping was then stopped.

29 The sinking of said schooner and all the losses thereby occasioned to the libellants were caused wholly by the negligence and want of skill and care on the part of the said master in not ascertaining the condition of the bottom of said berth or dock, and in not shoving said schooner further away from said wharf into deeper water when advised to do so, and in not placing said additional

scow between said schooner and said wharf, as urged to do, said scow being provided for that purpose by the respondents as aforesaid, and in not pumping said schooner when found to be in a leaky condition, and in not taking any measures to prevent said vessel from sinking when it was known that she was leaking.

10. These respondents, further answering, say that after said schooner sank as aforesaid in said dock she was allowed to remain there until about the 23 day of November, 1893, and during that time no proper or usual means were taken to raise her or to prevent her from becoming a total loss, although, if prompt and skillful effort had been made and competent persons had been employed to raise and repair the said schooner, the greater part of the loss of which the libellants complain would have been avoided.

11. That all and singular the premises are true.

Wherefore the respondents pray that this court will pronounce against the libel and condemn the libellants to pay costs herein.

CHARLES G. SMITH,

By CHARLES G. SMITH, JR.

CHARLES G. SMITH, JR.

EDWARDS & BARNARD,

NATH'L WILSON,

*Proctors for Respondents.*

DISTRICT OF COLUMBIA :

Charles G. Smith, Jr., being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated as of his own knowledge are true, and those stated upon information and belief he believes to be true.

CHARLES G. SMITH, JR.

Subscribed and sworn to before me this 26th day of December, 1893.

[SEAL.]

E. L. WHITE,

*Notary Public, District of Columbia.*

*Cross-libel.*

Filed Dec. 26, 1893.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States for the District of Columbia.

CHARLES G. SMITH and CHARLES G. SMITH,  
Jr., Libellants,

vs.

CHARLES BURNETT, Suing on His Own Behalf, and said Charles Burnett and Charles G. Endicott, Executors of the Last Will and Testament of Harriet E. Burnett, Deceased; Jane Eliza Allison, Samuel C. Allison, and Edward S. Allison, Executors of the Last Will and Testament of Michael S. Allison, Deceased; Henrietta W. Allison, Richard C. Washburn, Michael De Motte Vreeland, Charles G. Endicott, on His Own Behalf, and Charles G. Endicott and Mordecai T. Endicott, Executors of the Last Will and Testament of Thomas D. Endicott, Deceased; Drucilla M. Cox, Charlotte A. Rogers, John Van Buskirk, William J. Boothe, Ephraim P. Emson, Executors of the Last Will and Testament of Christian D. Emson, Deceased; William B. Lloyd, Michael Tobin, on His Own Behalf, and Michael Tobin and John  
31 Riley, Executors of the Last Will and Testament of Peter J. Connolly, Deceased, Owners of the Schooner "Ellen Tobin."

No. 379. Admiralty.

To the honorable justice of the supreme court of the District of Columbia, holding a district court of the United States for said district:

The cross-libel of Charles G. Smith and Charles G. Smith, Jr., against Charles Burnett, suing on his own behalf, and said Charles Burnett and Charles G. Endicott, executors of the last will and testament of Harriet E. Burnett, deceased; Jane Eliza Allison, Samuel C. Allison, and Edward S. Allison, executors of the last will and testament of Michael S. Allison, deceased; Henrietta W. Allison, Richard C. Washburn, Michael De Motte Vreeland, Charles G. Endicott, on his own behalf, and Charles G. Endicott and Mordecai T. Endicott, executors of the last will and testament of Thomas D. Endicott, deceased; Drucilla M. Cox, Charlotte A. Rogers, John Van Buskirk, William J. Boothe, Ephraim P. Emson, executors of the last will and testament of Christian Emson, deceased; William B. Lloyd, Michael Tobin, on his own behalf, and Michael Tobin and

John Riley, executors of the last will and testament of Peter J. Connolly, deceased, owners of the schooner "Ellen Tobin," in a cause civil and maritime in tort doth allege and articulately propound as follows:

1. The cross-libellants are citizens of the United States and residents of the District of Columbia.

2. The schooner "Ellen Tobin" is a vessel of one hundred tons burthen, registered and enrolled, and was at the time of the occurrence hereinafter mentioned engaged in commerce between the various ports of the United States.

3. On the second day of August, 1893, the said schooner then being at the port of Georgetown, District of Columbia, then  
32 leased and in the possession of the libellants and being commanded by one John Haskins, master, an oral agreement was made by and between the libellants and the said master, acting on behalf of the owners of the said schooner, whereby the said master agreed to receive at their said wharf and to convey from said port of Georgetown to Fort Monroe, Virginia, a cargo of crushed stone at and for the compensation of fifty cents per ton.

4. While said schooner was lying at said wharf and while taking on said cargo of crushed stone said schooner began to leak, and in consequence of the negligence, carelessness, and want of skill on the part of said master in not removing the water therefrom and in not placing the said schooner in a place of safety, and by reason of the negligence of the said master in failing to take proper measures to ascertain the condition of the bottom of said berth or dock at said wharf, and to avoid the danger of injury that the said master would have discovered if he had made proper soundings and examination of the said berth and dock and the bottom thereof the said schooner on the sixth day of August, 1893, sank at said wharf at her said berth and in said dock.

5. The aforesaid owners of said schooner and the said master neglected and refused to take prudent and proper measures for the raising and removal of said schooner from said dock and berth, and negligently and wrongfully suffered and permitted the said schooner to be and remain sunk at said wharf and in said berth from the said sixth day of August, 1893, until the 23 day of November, 1893.

6. The said schooner, being sunk in said berth and dock as aforesaid, became and was an obstruction to the use and occupation of said berth and dock and to the use and occupation of  
33 said wharf from the said sixth day of August, 1893, to said 23 day of November, 1893, and prevented the loading and unloading of stone therefrom, and increased the cost of loading and unloading such stone as the respondents were able to load and unload thereat and therefrom and increased the cost of getting stone to the crushers on said wharf, and caused a loss of stone to the respondents, to the loss and damage of the libellants in the sum of two thousand five hundred dollars.

7. While said schooner so remained sunk as aforesaid and an obstruction to the said berth and dock, by the fault and negligence of said owners, one of the anchors of said schooner, through no



negligence of the libellants, caught onto one of the libellants' scows and ran into and through the bottom of the said scow, causing her to sink and putting the libellants to an expense of two hundred dollars to raise and repair said scow.

8. The libellants from time to time notified the said owners to remove the said schooner after she was so sunk as aforesaid, but they paid no attention thereto.

9. By reason of the premises the libellants have sustained damages and loss to the extent of not less than \$2,700, for which libellants claim reparation in this suit, together with costs and necessary expenses.

10. All and singular the premises are true.

Wherefore libellants pray that process may issue in due form of law against said Charles Burnett and the other owners of the said schooner hereinbefore named, and that this court will pass a decree against the said Charles Burnett and the other owners of said

schooner *in personam*, to be paid, with costs, and for such other  
34 and further relief and redress as to right and justice may appertain and this court is competent to grant.

CHARLES G. SMITH,  
By CHARLES G. SMITH, JR.  
CHARLES G. SMITH, JR.

EDWARDS & BARNARD,  
NATH'L WILSON,  
*Proctors for Cross-libellants.*

#### DISTRICT OF COLUMBIA :

Charles G. Smith, Jr., being first duly sworn, deposes and says that he has read the foregoing cross-libel, and that the facts therein stated as of his own knowledge are true, and those stated upon information derived from others he believes to be true.

CHARLES G. SMITH, JR.

Sworn to and subscribed before me December 26th, 1893.

[SEAL.] E. L. WHITE,  
*Notary Public, District of Columbia.*

#### *Replication.*

Filed Dec. 30, 1893.

In the Supreme Court of the District of Columbia, Holding the District Court for said District.

CHARLES BURNETT *et al.* }  
vs. } Admiralty. No. 379.  
CHARLES G. SMITH *et al.* }

The replication of Charles Burnett and other, libellants, to the answer of Charles G. Smith and Charles G. Smith, Junior, alleges that they, the said libellants, will aver, maintain, and prove their



35 libel to be true, certain, and sufficient, and that the said answer of the defendants is uncertain, untrue, and insufficient, and they humbly pray as in and by the said libel they have already prayed.

RANDALL HAGNER,  
*Proctor for Libellants.*

*Motion for Order to Take Deposition.*

Filed Jan. 3, 1894.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT *et al.*

*vs.*

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR. } In Admiralty. No. 379.

Now comes the proctor of the libellants in this cause and moves the court for an order to take the deposition of William Barkeby, or William Bakeby, in support of the libellants' cause herein, and in support of the motion files herewith the affidavit of said proctor. The said William Barkby, or Bakeby, resides more than one hundred miles from the place where this cause is to be tried and is about to go on a voyage to foreign parts and does not know when he will return.

DISTRICT OF COLUMBIA, *set*:

Before me this day personally appeared Randall Hagner, who, being first duly sworn, deposes and says, one William Barkby, or William Bakeby, who was the cook upon board the schooner "Ellen Tobin" at the time of her injury at the wharf of Charles G. Smith and Charles G. Smith, Junior, is, as I am credibly informed, about to go to foreign parts more than one hundred miles from the place where this cause is to be tried and does not know when he will return, and for that reason affiant is informed and believes his deposition *de bene esse* should be taken.

RANDALL HAGNER.

Sworn to and subscribed before me this 2d day of January, A. D. 1894.

[SEAL.]

RUTLEDGE WILLSON,  
*Notary Public.*

*Order to Take Deposition.*

Filed Jan. 3, 1894.

In the Supreme Court of the District of Columbia, Sitting as and  
Holding the District Court.

CHARLES BURNETT <i>et al.</i>	}	In Admiralty. No. 379.
<i>vs.</i>		
CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR.		

Upon consideration of the motion of the proctor for libellants for an order to take the deposition *de bene esse* of the witness William Bookley, or William Bakeby, and the affidavit filed in support thereof, it is this third (3d) day of January, A. D. 1894, ordered that the deposition of the said William Barkley, or William Bakeby, be taken before Rutledge Wilson, Esq., an examiner of the supreme court of the District of Columbia and notary public, at his office, at 3 o'clock in the afternoon of Thursday, January 4th, 1894, said office being at 406 5th street northwest, in the city of Washington, in said District of Columbia, and that the deposition be returned to this court by him, in accordance with the rules and practice in such cases.

CHAS. C. COLE,  
*Asso. Justice.*

We consent to the passing of the above order and admit the notice required therefor.

EDWARDS & BARNARD,  
NATH'L WILSON,  
*Proctors for Defendants.*

*Motion to Dispense with Security.*

Filed Jan. 6, 1894.

In the Supreme Court of the District of Columbia, Sitting as a  
United States District Court.

CHARLES BURNETT <i>et al.</i>	}	In Admiralty. No. 379.
<i>vs.</i>		
CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR.		

And now come the libellants, by their proctor, and move the court to dispense with the giving of security on their part, as provided in rule 37 of this court, as it will appear upon the face of the record that there has been no attachment or seizure of property herein, and, further, that if said libellants shall be required to give bond that the respondents in said libel be also required to give bond to secure the amount claimed in the original libel.

RANDALL HAGNER,  
*Proctor for Libellants.*

38

*Motion for Reference to Take Testimony.*

Filed Jan. 6, 1894.

In the Supreme Court of the District of Columbia, Holding a  
District Court of the United States for the District of Columbia.

CHARLES BURNETT *et al.**vs.*

CHARLES G. SMITH and CHARLES G. SMITH,  
JUNIOR.

In Admiralty. No. 379.

And now come the libellants, by Randall Hagner, their proctor,  
and move the court to refer this cause to some suitable person to  
take the testimony herein on behalf of the libellants.

RANDALL HAGNER,

*Proctor for Libellants.**Answer to Cross-libel.*

Filed Jan. 6, 1894.

In the Supreme Court of the District of Columbia, Holding a  
District Court of the United States for the District of Columbia.

CHARLES G. SMITH and CHARLES G. SMITH,  
JUNIOR, Cross-libellants,

*vs.*

CHARLES BURNETT and Others.

Admiralty. No. 379.

And now come the respondents to the cross-libel, namely, Charles  
Burnett, suing on his own behalf, and said Charles Burnett  
39 and Charles G. Endicott, executors of the last will and testa-  
ment of Harriet D. Burnett, deceased; Jane Eliza Allison,  
Samuel C. Allison, and Edward S. Allison, executors of the last  
will and testament of Michael S. Allison, deceased; Henrietta W.  
Allison, Richard C. Washburn, Michael De Mott Vreeland, Charles  
G. Endicott, on his own behalf, and Charles G. Endicott and  
Mordecai T. Endicott, executors of the last will and testament of  
Thomas D. Endicott, deceased; Drucilla M. Cox, Charlotte A.  
Rogers, John Van Buskirk, William J. Booth, Ephraim P. Emson,  
executors of the last will and testament of Christian D. Emson,  
deceased; William B. Lloyd, Michael Tobin, on his own behalf,  
and Michael Tobin and John Riley, executors of the last will and  
testament of Peter J. Connolly, deceased, owners of the schooner  
"Ellen Tobin," as filed herein by Charles G. Smith and Charles G.  
Smith, Junior, and for answer to the said cross-libel do allege and  
propound as follows:

1. They admit the allegations contained in the 1st paragraph  
of said cross-libel to be true and the citizenship and residence of  
cross-libellants.

2. That the allegations of the 2d paragraph are true, and they  
aver and charge in addition thereto that said vessel is of over  
six hundred tons burden for inside navigation, though registered  
at 413 and  $\frac{61}{100}$  tons.

4—582.

3. They deny the allegation of said 3d paragraph if taken in one sense, but the same is capable of many interpretations, and respondents say that they admit the allegations of said 3d paragraph to be substantially true, as they understand it to be set forth, except they deny that said vessel was at Georgetown, but aver she was at Fort Washington when said oral contract was made through one Lee, a shipbroker, and they deny that said vessel was leased by these libellants in the original libel and now respondents in this cross-libel,

but, on the contrary, aver that these respondents were the  
 40 owners of said vessel, but if it is intended in said cross-libel to state in said paragraph that said Charles G. Smith and Charles G. Smith, Junior, were the lessees of said vessel these respondents aver that that was very nearly their position and relation with said vessel, although it was rather a contract of affreightment that said Smiths made with respondents in regard to said vessel than a lease, and in addition to the facts stated in said paragraph these respondents aver and charge that by the terms of the aforesaid oral contract said cargo of stone was to be about six hundred tons by the terms of said oral contract, and in addition that Smiths, as parties to the said oral contract, were to both load and unload said schooner of said crushed stone; and further if it is intended by said paragraph to show what said Smiths really leased there was in Georgetown aforesaid and leased by said Smiths the said wharf described in the lease recorded in Liber No. 1573, at folio 179, of the land records of the District of Columbia, a copy of which was made part of the original libel herein, marked Exhibit A, and is also made part of this answer, as well as several wharves lying together and adjoining the above property on the east thereof.

4. They deny most positively every and each and all of the allegations contained in said fourth paragraph, and deny that while said schooner was lying at said wharf and taking on said cargo of crushed stone said schooner began to leak, and they deny that "in consequence of the negligence, carelessness, and want of skill on the part of said master in not removing the water therefrom and in not placing the said schooner in a place of safety and by reason of the negligence of the said master in failing to take proper measures to ascertain the condition of the bottom of said berth or dock at said wharf, and to avoid the danger of injury that  
 the said master would have discovered if he had made proper  
 41 soundings and examination of the said berth and dock and the bottom thereof, the said schooner on the sixth day of August, 1893, sank at said wharf, at her said berth and in said dock," and they deny most positively each and every of said allegations in said paragraph attributing negligence in any way whatever to said master, by reason of which said vessel was sunk and became a total loss (and worse than a total loss to these respondents, as they were, besides losing their vessel, compelled to pay more than twelve hundred and forty dollars to get the crushed stone pumped out of her, besides many other expenses); but, on the contrary, they, the respondents, aver that it was by reason of the gross

and inexcusable negligence, unskillfulness, and the improper manner on the part of the said Charles G. Smith and Charles G. Smith, Junior, the said lessees of said wharf, berth, and dock, in permitting the said berth in front of said wharf to remain filled up with a natural rock, stones, or other obstruction, so that said berth at said wharf could not float said schooner when not much more than even half loaded, all of which caused the injury in said cross-libel complained of; and respondents aver that said vessel did not leak until some time after she had been negligently and carelessly loaded down by the said Smiths, lessees of said wharf as aforesaid, upon said natural rock or other obstruction in said berth.

5. These respondents deny most positively that they, the owners of said schooner, and the master or any or either of them neglected and refused to take prudent and proper measures (or measures, as stated in said paragraph) for the raising and removal of said schooner from said dock and berth, and negligently and wrongfully suffered and permitted the said schooner to be and remain sunk at said wharf and in said berth from the 6th day of August, 1893, until the 23d day of November, 1893; but, on the contrary, these respondents to said cross-libel aver that they made every proper and possible effort to get bids from the various wrecking companies and others to take out the four hundred tons of stone then in said vessel and to raise her and take her out of navigable water, but that by reason of the enormous sums of money required for the work, the lowest bid being \$8,000, and after a conference with the attorney for said Smiths, lessees as aforesaid of said wharf, to whom said owners had been referred, it was thought best in the interest of all concerned not to accept said bid, but to endeavor to get the said crushed stone pumped out of her as a separate contract, after which it might be managed to raise said vessel for a small sum. Then it was, after full understanding with said Smiths, through their attorney, and after conference with him on the part of said owners by their attorney, that a conditional contract was entered into by the said master, Hankins, on the part of the owners, with one John B. Lord, that if said Lord should get the stone out of said schooner he was to receive the sum of \$800, but nothing in the event that he did not get it out, and that after a week's pumping said Lord threw up said contract, after which another contract was entered into, by which said Lord agreed to pump said stone out for \$1,200 in cash, which after three weeks he finally succeeded in doing, and received from the owners the sum of \$1,200 therefor, and that besides said sum above named your respondents paid \$40 to the said cross-libellants for handling the stone after it was pumped out on their lighter lying alongside of said wharf and schooner, and it now, these respondents aver, seems ridiculous for said Smiths to claim that they knew nothing of said contract with Lord, as they, said Smiths, and their counsel knew all about it, and respondents aver that this will be seen from an examination of Exhibit B to the original libel, and which is made part hereof, and aver that it comes now with but poor grace from them to accuse respondents of negligence in not raising said schooner in a shorter

43 time, when the delay was only caused, or the greater part of the delay was only caused, by a desire on respondents' part to act in the most reasonable, fair, and just manner for all concerned, and not to spend lavishly money which either the said Smiths or the respondents would eventually have to lose.

6. Respondents deny that the said schooner being sunk was an obstruction to the use and occupation of said berth and dock, but aver, on the contrary, that vessels were by permission of your respondents allowed to moor alongside said schooner and to load with stone, although they admit it was rather inconvenient and may have cost a little more to wheel the crushed stone over from the crushers on boards laid over said schooner Ellen Tobin; and respondents deny that this prevented the loading and unloading of stone therefrom, but aver that loading and unloading went on whenever there was any to do by said Smiths, but admit that the cost was slightly increased, but deny that it, the said cost or the damage therefrom to the said Smiths, was \$2,000 or even a tenth of that amount, and as all of said additional cost in said paragraph set forth and the damages stated to have been incurred therein originated in the neglect and carelessness of said Smiths, the lessees of said wharf, it was their own fault, and certainly should not be either paid for by respondents or deducted from the enormous injury and damage done them by said Smiths.

7. These respondents deny every and all the allegations of the 7th paragraph of said cross-libel, and if the same are in any way relevant or to affect the interests of these respondents they call for strict proof thereof, but aver and charge the fact to be that it was through the negligence and carelessness of said Smiths and their employees if said scow was sunk by one of the anchors running through the bottom of said scow, as one of the employees of said Smiths had several days before said occurrence let the said anchor down, and

44 afterward said Smiths and their employees brought said scow down and improperly fastened her to the said schooner, so that subsequently said scow, being negligently only fastened at one end thereof, swung around and caught on said anchor, which in that way caused said injury, if any real injury was caused to said scow; of all of which injury these respondents require strict proof, and they deny that the said injury to said scow caused any such amount of damage, and call also for strict proof of said amount of damage if they are to be held therefor, and aver that said damage was merely trivial.

8. Respondents deny that the cross-libellants herein notified the respondents to remove said schooner from time to time after she was sunk as aforesaid, but admit they did notify them once, and referred them to Messrs. Edwards and Barnard as their attorneys; and respondents deny that they paid no attention thereto, but, on the contrary, aver that from the very first time the owners heard that the vessel was sunk they were endeavoring to see what could best be done to protect their interest in the matter, and began almost immediately to request bids for raising said vessel.

9. Respondents deny most positively that said cross-libellants have

sustained damages and loss to the extent of not less than \$2,700, as charged in the 9th paragraph of said cross-libel, and aver that said cross-libellants should not in fairness and equity have a single dollar or anything whatever on said cross-libel or anything connected with the charges and exorbitant and inequitable claims set forth therein.

10. And respondents deny that all and singular the premises are true as stated in said 10th paragraph, but aver, on the contrary, that they are untrue, but aver that all and singular the premises contained in this answer are true.

45 Wherefore they pray the court to pronounce against said cross-libel and condemn said cross-libellants to pay the costs.

CHARLES BURNETT,

*On His Own Behalf, and said*

CHARLES BURNETT AND

CHARLES G. ENDICOTT,

*Executors of the Last Will and Testament of*

*Harriet E. Burnett, Deceased.*

JANE ELIZA ALLISON,

SAMUEL C. ALLISON, AND

EDWARD S. ALLISON,

*Executors of Last Will and Testament of*

*Michail S. Allison, Deceased.*

HENRIETTA W. ALLISON.

RICHARD C. WASHBURN.

MICHAEL DE MOTTE VREELAND.

CHAS G. ENDICOTT,

*On His Own Behalf, and*

CHARLES G. ENDICOTT,

MORDECAI T. ENDICOTT,

*Executors of the Last Will and Testament of*

*Thomas D. Endicott, Deceased.*

DRUCILLA M. COX.

CHARLOTTE A. ROGERS.

JOHN VAN BUSKIRK.

EPHRAIM P. EMSON,

*Executor of the Last Will and Testament of*

*Christian D. Emson, Deceased.*

WM. B. LLOYD.

MICHAEL TOBIN,

*On His Own Behalf, and*

MICHAEL TOBIN AND

JOHN RILEY,

*Executors of the Last Will and Testament of Peter Connolly,*

*Deceased, Former Owners of Schooner Ellen Tobin.*

CHARLES G. ENDICOTT.

RANDALL HAGNER,

*Proctor for Respondents.*



DISTRICT OF COLUMBIA, *set*:

Charles G. Endicott, being first duly sworn, deposes and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and that the facts therein stated as of his own knowledge are true and those stated upon information derived from others he believes to be true.

CHARLES G. ENDICOTT.

Sworn to and subscribed before me this — day of January, A. D. 1894.

J. R. YOUNG, *Clerk*,  
By L. P. WILLIAMS, *Ass't Clerk*.

46

*Testimony of William Barkley.*

Filed Jan. 6, 1894.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

CHARLES BURNETT *et al.*

*vs.*

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR. } In Admiralty. No. 379.

DISTRICT OF COLUMBIA, *ss*:

Met pursuant to the order made and entered herein to take deposition of witness *de bene esse* by consent on January 3, 1894, Minutes 2, p. 17, at the office of Rutledge Willson, an examiner of the supreme court of the District of Columbia and notary public, No. 406 5th St. N. W., in Washington city, in the said District, on the fourth day of January, A. D. 1894, at the hour of three o'clock post meridian; present, Randall Hagner, Esq., proctor for libellants; Charles G. Endicott, of libellants, and Capt. J. Hankins; Nathaniel Wilson, Esq., and Joe Barnard, Esq., proctors for libellees, and Charles G. Smith, Jr., of libellees; William Barkley, the witness mentioned in said order, and myself; Rutledge Willson, the examiner of the supreme court of the District of Columbia and notary public; and then and there the witness, WILLIAM BARKLEY, having been by me first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth about the matters in issue in the cause set out at the head of this caption and being examined by Mr. Randall Hagner, proctor for the libellants herein, testified as follows:

47

Q. State your name, age, residence, and occupation.

A. My name is William Barkley; 38 years of age; I reside in Jersey City, N. J.; cook and steward.

Q. Tell us where you were last summer.

A. I was on the "Ellen Tobin."

Q. When were you on her as steward and cook?

A. From Feb'y 14, 1893, to August—some time the latter part of August. I cooked on her until she sunk.

Q. Did you come from Fort Washington on her?

A. Yes.

Q. Did she leak any on her way up from Fort Washington to Georgetown?

A. No, sir.

Q. Did you see her pumps tried the day before she sunk?

A. Yes, sir; the night before she sunk, about 6 o'clock in the evening.

Q. What was the result of the trying of her pumps?

A. To see if she had any water in her.

Q. How long was she pumped at 6 o'clock Saturday evening?

A. Long enough to get 25 strokes out of her pump, I should judge.

Q. What happened then?

A. Nothing happened then. She was all right then.

Q. What did the 25 strokes show?

A. There was a little water, very little.

Q. Why did they stop, then?

A. Because they could not get any water out of her.

Q. When was that pumping—what part of the vessel?

A. In the bow, sir—forward.

Q. Why did they pump forward?

A. Because she was down by the head.

Q. Do you remember when you arrived in Georgetown?

A. On a Wednesday.

48 Q. Where did the vessel go when she first arrived in Georgetown?

A. We went up abreast of Mr. Lee's store.

Q. Is that further up or down the river than Mr. Smith's?

A. Further up.

Q. Why did you go up there?

A. There was a vessel lying at Mr. Smith's dock. I think there was two laying there, if I am not mistaken.

Q. Do you remember whether you went into Mr. Smith's wharf on Wednesday?

A. Yes; we dropped back into his wharf Wednesday afternoon.

Q. Did you see any loading of stone on her?

A. Not that day; no, sir. I could not say positively what day they started to load in.

Q. How long did she stay at Mr. Smith's dock before she sunk?

A. I could not tell you that positively. I never kept time of her.

Q. Was she there all the time from Wednesday until she sunk?

A. Yes, sir; I guess she was; those docks of his'n; yes, sir.

Q. Do you know Mr. Speaker?

A. I know him by sight; yes, sir. I have often spoke to him.

Q. What is his occupation?

A. Well, I suppose he — the boss or foreman of Mr. Smith, so far as I know.

Answer objected to as incompetent.

Q. Did you hear the capt. of the schooner, Capt. Hankins, ask Mr. Speaker, the foreman, anything about the position of the vessel on the Saturday before she sunk?

A. Question objected to as leading and incompetent as assuming the existence of facts having been proven.

A. I did, sir.

Q. What was it?

A. He asked him if he should shove her off some. He told him "Yes."

49 Q. Well, did he do it?

A. Yes, sir.

Q. How far off did he breast her?

A. I suppose about two feet.

Q. Well, what happened then?

A. Nothing at all happened then.

Q. Did the captain ask him anything else?

A. I could not say positively whether he did or not.

Q. Well, you go on in your own way and tell about it.

A. It was not long before he spoke to him after that, though. He spoke something in regard to breasting the vessel off at that time. He told me to breast her off, sir. The captain done it, sir. The captain asked him how was that for the vessel, and was she off far enough. The foreman told him she was all right where she was.

Q. Were they then still loading her or had they knocked off for the day?

A. I don't think they was loading then. I won't say positively whether they were loading her then or not.

Q. When, after Saturday evening at about 6 o'clock, as you have stated, was she pumped again?

A. Not after six on Saturday that I know of.

Q. When after that did you see her pumped?

A. On Sunday morning, sir.

Q. Whom did you see pumping her out Sunday morning?

A. I seen two men pumping her out.

Q. What men were they?

A. Men who were employed on the vessel.

Q. Do you remember their names?

A. No, sir.

50 Q. How long did they pump then?

A. I don't know how long they pumped. They pumped quite a spell.

Q. Go on in your own way and tell about that.

A. They pumped until they got tired and they concluded something was wrong with the vessel.

Q. Did you see any water in her?

A. Yes, sir.

Q. Tell us about that and how much you saw in her.

A. As far as I know, this man went down in the hold and sounded and found two feet of water.

Q. Was that forward or aft?

A. Forward.

Q. Did you do anything at all? What did you do?

A. I hoped pump some myself. The captain told this man Andrew to go down in the hold and see if there was any water—to sound and see how much water there was there.

Q. What happened then?

A. He came up and reported to the captain. He sounded with a rake-handle. He measured with a rake-handle. The captain commenced getting uneasy.

Q. What did the captain do then?

A. I have an idea the captain thought he would pump a little himself. He sat on the rail and thought there was something wrong with the vessel. He said to me, There is something wrong with the vessel; she never acted this way before.

Answer objected to, being a statement of what was said by an officer of the vessel in the absence of the agent of the defendant; is immaterial and incompetent.

Witness, continuing, says: After that the captain told me to light a light and go down in the windlass-room. He went down himself with me.

51 Q. Did you light the light and go down with him?

A. Yes, sir.

Q. Well, what did you see down there?

A. Water there, sir.

Q. What was the condition of the water?

Objected to as leading, calling for an opinion of the witness concerning something he did not know.

A. It was increasing all the time.

Q. Now, go on and tell us about it.

A. I disremember whether the captain started up to look for an engine before he hired them colored men or not to pump or not.

Objected to the witness stating what he disremembers.

Q. Now, go ahead.

A. While the captain went to look for the engine I knew they kept pumping. That is as much as I can say about that. I can't go no further.

Q. How long were you aboard of her after Sunday morning early?

A. Until Monday morning.

Q. Until she sank?

A. Yes.

Q. What time was it that she sank?

A. I could not say exactly.

Q. About?

A. She must have filled up to her lower deck Sunday afternoon about 4 or 5.

Q. Did you hear any one on that Saturday afternoon before she sank say anything about sounding around the vessel?

Objected to as incompetent.

A. I seen the captain sound myself.

Q. What did the captain sound with?

52 A. The lead line.

Q. Did you see how much the sounding was?

A. No, sir.

Q. Has the lead line figures on it?

A. Yes, sir; marks, not figures.

Q. Did you hear any one tell the captain to sound?

Objected to as incompetent.

A. No, sir; I did not.

Cross-examination.

By Mr. WILSON and Mr. BARNARD:

Q. When was the last stone put on board the schooner before she sank?

A. On a Saturday, sir.

Q. At what hour?

A. I could not tell exactly what hour, sir.

Q. State as nearly as you can the hour.

A. It might have been along 4 or 5 o'clock.

Q. Where were you at that time?

A. On board the vessel.

Q. Where on board the vessel?

A. On the vessel's deck, around the house.

Q. Did they stop loading before the usual time for stopping?

A. I am inclined to think they did, sir.

Q. Where were you from the time they stopped loading up to 9 o'clock that evening.

A. I won't say positively whether I was on board the vessel or up at Mr. Lee's store. I won't say positively.

Q. Where did you sleep that night?

A. On board the vessel, down in the cabin.

Q. What time did you go to bed?

A. I can't say positively, but it was after ten o'clock.

53 Q. Do you remember at what hour you went on board the vessel on Saturday night?

A. I do not, sir.

Q. Who did you see when you went on board that night?

A. I don't remember seeing any person. I might have seen some person, but I don't remember, sir.

Q. Who was on watch that night?

Objected to on the ground that as the vessel was at her moorings in a dock, she did not require to have any watchmen, and therefore the question is immaterial.

A. I won't say for certain whether the captain was there or not at the time. I won't say either way.

Q. Is that the best answer you can make to the question?

A. I was not there, but the captain was there when I came. I am sure of that.

Q. Did you see him when you went on board?

A. No, sir.

Q. How do you know he was there?

A. I heard him turn over in his berth and grunt. I know that much; his room was locked.

Q. Can you state, if you know, whether anybody was on watch on deck that night or any part of the night?

Same objection as last noted.

A. No, sir.

Q. What time did you get up on Sunday morning?

A. I got up about five o'clock.

Q. Who did you first see on board the vessel?

A. I did not see anybody on the vessel but myself when I first got up. I can't say for certain who I first saw. I can't place the person.

-Q. When did you first see the captain?

54 A. When I rang the bell for breakfast.

Q. Did you cook breakfast for all who were on board that morning?

A. I did, sir.

Q. Well, who were at breakfast?

A. All hands were there; all got their breakfast—the captain, I myself, and there was a couple more in there; I could not tell their names. One was named Andy. I don't know the name of the other one.

Q. Did the two men you speak of belong to the crew?

A. Yes, sir; the crew.

Q. Where was the rest of the crew?

A. That was all we had employed at the time.

Q. No mate?

A. Yes, sir. He was not there at the time.

Q. Do you mean to say that the only persons on board that Saturday night were those you have named?

A. Yes, sir; the mate had started for Baltimore some time that Saturday, away in the afternoon, about  $\frac{1}{2}$  past 3 or 4.

Q. What time did you have breakfast that Sunday morning?

A. Between 7 and 8. We were not in a hurry. Nothing was doing.

Q. When did the pumping begin?

A. I think the pumping started before we had breakfast, if I am not mistaken.

Q. What time?

A. We must have started about six o'clock.

Q. Did you pump?

A. No, sir.

Q. Had you a steam pump on board?

A. No, sir.

Q. How long did the pumping continue, and who were at the pump from the time the pumping commenced until they stopped?

55 A. I did not know them—who were pumping. The ones we had were then pumping—the two sailors—Andrew and the other one and the colored men who were hired. There were four or five of the hired men—four, anyway.

Q. What time did the pumping stop?

A. I could not say for certain, not knowing whether it was 9 or 10 o'clock.

Q. State as nearly as you can what time the pumping was stopped.

A. I can't say for certain; I did not look at the clock. It's the best answer I can make.

Q. Was any pumping done after ten o'clock?

A. I can't say.

Q. Any after 11 o'clock?

A. I can't say.

Q. Any pumping done after 12 o'clock?

A. No, sir; I don't think there was.

Q. What was done between 12 o'clock and the time the vessel sank?

A. There wasn't any pumping done at that time, of course.

Q. Who was on board between 12 o'clock and the time the vessel sank?

A. I don't know.

Q. Was you there?

A. Yes, sir.

Q. Who else you don't know?

A. I think the captain was there; I won't say for certain.

Q. Can you name anybody else?

A. There was quite a lot of them there, but I could not name them, though. I know the two sailors was around there, of course.

Q. What time was it when you went down in the hold with the candle?

A. I could not tell you exactly.

Q. About?

56 A. I can't say.

Q. Was it daytime or night?

A. Daytime.

Q. Before or after breakfast?

A. I disremember whether it was or not.

Q. What is your best recollection about it, whether it was before or after breakfast?

A. It was after breakfast.

Q. Did you find out where the water was coming in?

A. No, sir.

Q. Did you find out how much water was in the hold?

A. No, sir; I didn't.



Q. Did you find out how much was in the room you were in?

A. No, sir.

Q. When was the tide high on Saturday night?

A. I could not say; I did not know; kept no run of it.

Q. Was the schooner afloat when you stopped work in Saturday afternoon?

A. I don't know; I never looked after that.

Q. Was anything done after work stopped on Saturday afternoon to get the vessel into deeper water?

A. She was shoved off. They were shoving on her. I don't know whether she was afloat or not, sir.

Q. Who did you see shoving?

A. I saw the captain at it and two men.

Q. At what hour?

A. I could not say at what hour exactly it was, but it was after they had stopped work.

Q. Was the vessel afloat at high tide on Saturday night?

A. I don't know when it was high tide.

57 Q. There was something in her position which attracted your attention either on Saturday night or Sunday morning, was there?

A. Sunday morning there was.

Q. What was it?

A. The water that was in her.

Q. Do you know who was the watchman on the wharf Saturday night?

A. I know who in general watched there, but I could not say who watched Saturday night.

Q. Who was it?

A. I don't know, sir, his name; there was generally a watchman there.

Q. Did you see any person on the wharf on Saturday night as you were going on board the vessel?

A. I did not see any person as I know of.

Q. Did you have any talk with any person on the wharf as you were going on board?

A. I don't remember now.

Q. You were sober, I suppose.

A. I was sober; yes, sir.

Redirect:

Q. Would you know the name- of those sailors if you heard them?

A. Yes, sir; I know one of them; his name was Andrew. I always called him Andrew because the captain called him that.

Q. Did you know the other man's name? Was it Martin Thompson?

A. I don't know his name.

Q. Did you do any sounding yourself around the vessel?

A. Yes, sir; I did; after she sunk and while the captain was gone to look after a steam-engine.

Q. Where did you sound?

A. On the outside of her.

Q. What did you sound with?

A. The lead line.

58 Q. What depth of water was there?

Objected to as incompetent on redirect examination.

A. About 15 or 16 feet of water when I sounded on the outside, the off-shore side towards the river.

Q. Did you see the captain of a tugboat sounding then?

A. No, sir; I did not see him sounding, but I saw him then; the tug was lying alongside.

Question and answer objected to as immaterial and irrelevant.

Q. You say the captain had gone after a steam-engine. What time did he go?

A. I can't say exactly.

Q. What was the tug doing there?

A. I don't know what the arrangement was; the tugboat came, but I don't know.

Q. Did anybody go after it?

A. I can't say positively whether the captain went after that boat or not, but he said he was going to get a boat.

Recross:

Q. In your direct examination you spoke of the captain asking the foreman about her being shoved off and if she was off far enough. What time of day was that?

A. I don't know as I could just say to a minute just what time it was, of course; it was daylight, in the afternoon.

Q. About what time?

A. Between 4 and 5, I suppose. I did not exactly look at the time.

Q. Was it after they stopped loading?

A. I think it was after they stopped loading, sir.

59 Q. Do you know of any further matter or thing of interest to either of the parties to this suit? If yea, state it.

A. I do not.

WILLIAM BARKLEY.

Subscribed and sworn to before me this 4th day of January, A. D. 1894.

[SEAL.]

RUTLEDGE WILSON,  
*Examiner of the Supreme Court of the  
District of Columbia and Notary Public.*

DISTRICT OF COLUMBIA, ss:

I hereby certify that on the fourth day of January, A. D. 1894, at the office of Rutledge Wilson, No. 406 5th St. N. W., in the city of Washington, in the District of Columbia, personally appeared before me, pursuant to the order of reference set out and mentioned in the

caption hereof and now in the file of the papers in this cause, at the hour of three o'clock post meridian of said day, William Barkley, the witness named in said notice and Randall Hagner, Esq., appeared as counsel for the libellants and Nathaniel Wilson, Esq., and Job Barnard, Esq., appeared as counsel for the libellees, and the said William Barkley, being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth as to the matters at issue in the cause of Charles Burnett *et al.*, libellants, *vs.* Charles G. Smith and Charles G. Smith, Jr., libellees, No. 379, admiralty, now depending in the supreme court of the District of Columbia, as the same is set out in the caption hereof, and, being carefully examined, deposed and testified, as appears by the deposition of said witness hereto annexed; and I further certify that the said deposition was then and there reduced to writing, both questions and answers by me in the presence of said witness, and after the same had been so reduced to writing the same was read over to and subscribed by said witness in my presence; and I further certify that the reason why said deposition was taken is that said witness resides more than one hundred miles from the place where said cause is to be tried, and is about to make a foreign voyage. I further certify that said deposition of said witness was taken by me in pursuance of, under, and in accordance with the said order of reference and the law in such case made and provided, and the caption is hereby made part hereof.

I further certify that I am not of counsel nor attorney to either of the parties to nor interested in the event of this suit, and that the fee of \$12 for taking and returning said deposition has been paid to me by the libellants, and that the same is just and reasonable.

In testimony whereof I have hereunto set my hand and my notarial seal this 4th day of January, 1894, at Washington city, in the District of Columbia.

[SEAL.]

RUTLEDGE WILSON,  
*Examiner of the Supreme Court of the  
District of Columbia and Notary Public.*

*Order Directing Taking of Testimony.*

Filed Jan. 8, 1894.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT <i>et al.</i>	} Admiralty. No. 379.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

On consideration of the motions herein filed it is, this 8th day of January, A. D. 1894, ordered that Rutledge Wilson, Esq., be, and he is hereby, appointed special commissioner to take the testimony on behalf of the libellants; the said testimony to be taken down by a shorthand writer and put into type-

writing and returned to this court, and, further, that no preliminary bond be required in either this cause or on the part of the cross-libellants.

W. S. COX, J.

*Stipulation.*

Filed March 22, 1894.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT *et al.* }  
   *vs.* } Admiralty. No. 379.  
 CHARLES G. SMITH *et al.* }

*List of Bills of Sale of the Schooner Ellen Tobin to John B. Lord,  
 Given to Carry out the Sale to Him for the Sum of \$100.00.*

Charles Burnett,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 7, 1893.

Harriet E. Burnett's executors,  $\frac{4}{64}$  shares of schooner, dated and executed Dec. 18, 1893.

Michael S. Allison's executors,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 18, 1893.

Henrietta W. Allison,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 18, 1893.

Richard C. Washburn,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 9, 1893.

Michael De Motte Vreeland,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 7, 1893.

Charles G. Endicott,  $\frac{7}{64}$  shares of schooner, dated and executed Dec. 20, 1893.

Thomas D. Endicott's executors,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 18, 1893.

Thomas D. Endicott's executors,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 18, 1893.

Drucilla M. Cox,  $\frac{4}{64}$  shares of schooner, dated and executed Dec. 26, 1893.

Charlotte A. Rogers,  $\frac{2}{64}$  shares of schooner, dated and executed Dec. 23, 1893.

Henry A. Crawford (named in enrollment) to Christian D. Emson,  $\frac{1}{64}$  shares of schooner, dated and executed Ap'l 15, 1889.

62     Executor of Christian D. Emson,  $\frac{9}{64}$  bill of sale, dated Dec. 11, 1893.

William B. Lloyd,  $\frac{4}{64}$  shares, dated and executed Dec. 13, 1893.

John Van Buskirk,  $\frac{4}{64}$  " " " " Dec. 9, 1893.

William J. Boothe,  $\frac{4}{64}$  " " " " Dec. 11, 1893.

Michael Tobin,  $\frac{6}{64}$  " " " " Dec. 13, 1893.

Peter J. Connolly's executors,  $\frac{2}{64}$  shares, dated and executed Dec. 13, 1893.

It is hereby this 21st day of March, 1894, stipulated and agreed between the proctors for the respective parties that the above list of the bills of sale to John B. Lord of the schooner Ellen Tobin bear

date and were executed as shown above, and this list is hereby substituted in this cause for the original bills of sale which have been offered in evidence and withdrawn by consent.

It is further stipulated and agreed that the original certificate of enrollment of the schooner "Ellen Tobin," which has already been put in proof, may be withdrawn (so that all of said above-named papers may be delivered to said John B. Lord), a copy of said certificate of enrollment, being Exhibit Libellants' Exhibit K (Hagner), being by consent substituted therefor; the same to be marked as said Exhibit K (Hagner) and to be considered for the purposes of this case as the original; said copy to be made by Rutledge Willson, commissioner, and consent that an order of court be passed directing the above.

RANDALL HAGNER,  
*Proctor for Libellants.*  
NATH'L WILSON,  
*Proctor for Respondents.*

63

*Order for Substitution.*

Filed Mar. 22, 1894.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	}	In Admiralty. No. 379. Dist. Court.
vs.		
CHARLES G. SMITH <i>et al.</i>		

By consent of the proctors for the respective parties, as shown above—

It is by the court, this 22d day of March, 1894, ordered that the original bills of sale unto John B. Lord be withdrawn, and that the original certificate of enrollment of the schooner "Ellen Tobin," already put in proof, be withdrawn and a copy thereof to be made by Special Commissioner Rutledge Wilson, Esq.; the same to be marked Exhibit K (Hagner) and to be considered for the purposes of this case as the original.

W. S. COX, J.

*Order Allowing Amendment to Libel.*

Filed July 7, 1894.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	}	Admiralty. No. 379.
vs.		
CHARLES G. SMITH <i>et al.</i>		

By consent of the proctors for the respective parties, it is by the court, this 7th day of July, A. D. 1894, ordered that the libellants may amend the libel by adding at the end of the 7th paragraph thereof the following words:

"Except that said Peter J. Connolly was then one of said

owners, and that he has since said injury, to wit, in September or October, 1893, departed this life testate, and by his last will and testament appointed said libellants, Michael Tobin and John Connolly, executors of said last will and testament, who have duly qualified as such, and as such executors thereupon became and now are the owners of the right to sue for his, said Connolly's, share of the injury to said schooner."

W. S. COX, J.

We consent to the passage of the above order.

NATH'L WILSON,

*For Respondents.*

RANDALL HAGNER,\*

*For Libellants.*

*Libellants' Testimony.*

Filed July 10, 1894.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT and Others,  
Owners of Schooner Ellen  
Tobin,

vs.

CHARLES G. SMITH and CHARLES  
G. SMITH, JR.

In Admiralty. No. 379. District  
Court. Doc. No. 1.

Be it known that at an examination of witnesses begun and held on 6th day of January, 1894, and continued from time to time by adjournments with notice until the 6th day of July, 1894, when the depositions hereto attached were taken, I, Rutledge Wilson, a special commissioner under and by virtue of the orders duly made  
65 and entered in this cause did cause to be personally present at my office, No. 406 5th St. N. W., Washington city, D. C., John Hankins, Joseph H. Lee, Charles J. Pierson, Nicholas Harp, Henry W. Brewer, Geo. W. Bell, Harry A. Wise, Wm. E. Bell, Charles Godfrey, Wm. H. Kendell, Wm. Gokey, Major D. Twiford, Walter D. Naramore, John B. Lord, Wm. Roberts, Park Agnew, James White, Fred. Davey, Charles Burnett, Randall Hagner, Wm. R. Taylor, Geo. W. Davis, William Coley, Charles G. Endicott, Wm. Woodfolk, Cornelius Eckhardt, Fred. L. Somers, Chas. W. Darr, Edgar P. Watkins, Thos. Berry, Andrew Stevens, Martin Thompson, Andrew J. Cole, and George A. Nowland to testify on behalf of the libellants in a certain cause now pending in the supreme court of the District of Columbia, in the District side thereof, in admiralty, and being numbered 379 in docket No. 1 of said District side of said court, wherein Charles Burnett and others are libellants and Charles G. Smith and Charles G. Smith, Jr., are respondents.

RUTLEDGE WILLSON,

*Special Commissioner.*

## DISTRICT OF COLUMBIA, ss :

I, Rutledge Willson, a special commissioner under the orders aforesaid made and entered, do hereby certify that in pursuance of the notice hereto attached and by stipulation between counsel for the respective parties to this suit, the depositions hereto attached and as therein will appear were taken down by my clerk, who was duly sworn to correctly take in shorthand and transcribe the same (except those not written in type, which I took down with my own hand) in the presence of and from the oral statements of the witnesses at the times and places designated in the caption hereto, and when the said depositions had been reduced to writing they were read over by me to each of said witnesses (except where the same were, by stipulation between counsel, by me signed for the  
 66 witness, as therein appears) and were by said witnesses respectively subscribed in my presence and in the presence of counsel for the parties respectively, who were then and there attending, all of said witnesses being first duly cautioned and by me first duly sworn to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in said suit.

Certain of the exhibits offered in evidence and filed in the case are with these depositions and certain others are filed in separate packages.

I further certify that I am not of counsel for any of the parties to said cause nor in any manner interested therein.

RUTLEDGE WILLSON,  
*Special Commissioner.*

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i> , Libellants,	} Admiralty. No. 379. District Doc.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i> , Respondents.	

## DISTRICT OF COLUMBIA, ss :

Met at the office of Rutledge Willson, No. 406 5th St. N. W., in Washington, D. C., at the hour of 3 o'clock p. m. on the 6th day of January, 1894—present, Randall Hagner, Esq., proctor for the libellants, and Charles G. Endicott, one of the libellants; Nathaniel Wilson, Esq., and Job Barnard, Esq., proctors for the respondents; the witness Hankins, the special commissioner and shorthand writer—and whereupon, under and by virtue of the stipulation made and entered into between counsel for the respective parties to this suit and hereto affixed, the witness JOHN HANKINS,  
 67 named in said stipulation and produced on behalf of the libellants, after being duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in the cause set out and pending, as shown by the head of this caption, and, being examined by Mr. Hagner, testified as follows:



In the Supreme Court of the District of Columbia, Holding a District Court of the United States for the District of Columbia.

CHARLES BURNETT *et al.*

vs.

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR.

In Admiralty. No. 379.

It is hereby stipulated and agreed that the testimony of John Hankins, late master of the schooner *Ellen Tobin*, and, if possible, the testimony of Charles G. Endicott may be taken on behalf of the libellants before Rutledge Willson, Esquire, as special commissioner, at 3 o'clock p. m., this 6th day of January, A. D. 1894, and to be by him returned to the court, and that said testimony be taken by said commissioner through a shorthand writer and reduced to typewriting.

NATH'L WILSON,  
EDWARDS & BARNARD,

*Proctors for Respondents in the Libel and for Cross-libellants.*

RANDALL HAGNER,

*Proctor for Libellants and Respondents in the Cross-libel.*

68 Direct examination.

By Mr. HAGNER:

My name is John Hankins. I am 45 years of age. I am a mariner by profession, and was the master of the schooner "*Ellen Tobin*" up to the time she was sunk near the wharf in Georgetown. I reside at Barnegat, State of New Jersey.

Q. Captain, in your own way, I desire that you state where you were, say, the 1st day of August, 1893, and all you know in relation to your connection with the schooner "*Ellen Tobin*" in regard to the way in which she happened to get to Georgetown.

Mr. WILSON: I object to that as too vague and indefinite.

A. I arrived at Fort Washington the 26th day of July with a load of cement. On the 28th day of July—that was Friday—late, I came up to Georgetown to see about getting a freight from Joseph H. Lee, and Mr. Lee told me that there was nothing in the market, only one load of coal for Allen's point, and that would be a long time loading, but there was some stone going to Old Point.

Mr. WILSON: I object to the witness testifying as to declarations made by Mr. Lee as being incompetent.

He told me there was some stone going at 50 cents to Old Point Comfort, Fort Monroe, paying 50 cents per ton, loading and discharging free of expense to the vessel. He and I both thought—I employed him as my broker—that I had better wait until the first of the week to see about the loading of the coal, and also to see about the loading of the stone. He said there were some vessels chartered, but did not know whether they would get there or not before I would be unloaded. I then went back on board the vessel and came up

again Monday morning following. He said the condition of the coal market was about the same. It would be ten days before we could load it, he thought; and the stone, the prospects were that we could commence loading that the next Thursday.

69 Q. State what time that would be Thursday.

A. Thursday following the 26th would be the 3rd of August; and I told him I would not be unloaded until Wednesday and would wait until Tuesday morning and come up and tell him positively what I would do. On Tuesday I went to Georgetown, and he told me the situation was unchanged, and I told him I would take the stone, and he told me then there was a vessel that had been chartered that had not arrived yet and if I got up the next day he thought I could commence loading the stone the next day. He expected her, but she did not put in an appearance. I went back on board the vessel at Fort Washington.

Mr. WILSON: Note an objection as to all the witness has stated as to his conversation with Mr. Lee and as to what he said to Mr. Lee and what Mr. Lee said to him.

WITNESS: I asked Mr. Lee if I needed to order a charter-party from Mr. Smith, and he said no. I did not. I asked him how much water there was and if there was enough to load us through, and he asked me how much I drew. I told him that with 570 to 575 tons of coal, our usual load, we drew from 14 to 14 feet three inches.

Mr. WILSON: How many tons?

A. 570 to 575 tons; that was our usual cargo of coal.

Mr. WILSON: What did you draw?

A. From 14 to 14 feet three with 570 to 575 tons of coal, and with stone I should put in 600 tons and draw fourteen and one-half feet. He told me there was plenty of water. He said, You can load with fifteen feet.

Q. You drew how many feet?

A. Fourteen and one-half feet.

Q. 600 tons of stone?

70 A. Yes; would draw fourteen and one-half feet. He said Mr. Smith had had it dug out this last spring to make 14 or 15 feet at low water. He said, You can load there at 14 feet with low water. I told you before that he said I did not want any charter-party. After he told me that I went down on board with the understanding that I would be unloaded the next day in time to get up from Fort Washington. I think about Wednesday, about 12 o'clock, the day I finished discharging cement, I took a tugboat that was they laying alongside, towed up to Mr. Smith's dock. When I got abreast of there I saw a vessel in there, and also two or three lighters lying there, and I hollered to them on the shore, and they said that we could not land there, but further above, until we got some of them out of the way; so I went up just above the soap factory and made fast.

Q. State where that is.

A. That is about two or three lengths above Mr. Smith's wharf.

Q. Two or three vessel's lengths?

A. Yes, sir; about two or three vessel's lengths, just above Mr. Smith's wharf. I went around and saw Mr. Speaker, foreman of Mr. Smith's works, on the dock. He told me the vessel was going out in a short time, and that he would haul the lighters so we could haul back into berth that night or afternoon; and just before he quit work the schooner went away, and he also hauled away the outside lighters and told me I could go to work. I then hauled back into berth abreast of Mr. Smith's wharf outside of one lighter. We lay there until morning. When Mr. Speaker came I told Mr. Speaker we would haul her so that the chute would hit the hatch, as we wanted her. We did not lay in the right position for the hatch under the chute. We hauled her until he said she was

71 right. I then asked him how much water there was there. He said it had been dredged out to between 14 and 15 feet this spring, and he showed me piling there. He said we did not dredge below that piling. It was the 4th piling from the stone-crusher down the river; but he told me the water was deeper below there, so that it did not need digging out, and there was water enough, just so we breasted our stern off so that the bilge would not touch where the lighters were unloading stone. He said there might have been some small stone falling off the lighters. He did not know there had been any, but there might be some dropped off. I took the lead—

Mr. WILSON: Note objection to the witness testifying anything about the declarations of Mr. Speaker, that it is not shown he had any authority to speak.

We had a pole to breast her off with from the dock so the vessel could not sag in on the lighter, so they could work the lighter to hoist the stone up on the crusher and crush it and let it come down the chute on board the vessel. After we got the pole in place I took the lead and threw it over aft, over the quarter. I did not find less than 13 feet up to the mizzen rigging, and after we got to the mizzen rigging and abreast of where Mr. Speaker stood it dropped off to about 16 feet. They went to work as soon as they got ready Thursday morning, after we got in place, dumping stone in the aft-hatch.

Q. What morning did you say that was?

A. Thursday morning. We arrived there Wednesday and this was Thursday. We worked all day in that hatch Thursday and worked in there Friday morning, and Friday, I think somewhere along towards 11 o'clock, I was in Mr. Lee's and Mr. Smith came in. Mr. Lee gave me an introduction to Mr. Smith and told me he was the gentleman I was loading for. That was

72 the first time I had seen him. I asked Mr. Smith how long it would take to load us. He told me he thought he should finish me on Monday. He could load about 150 tons a day. I asked him how much water he had there. He said that he had had it dredged out this spring, in April, and that they were to make 14 or 15 feet and there was 14 feet sure at low water.

Q. Did you mention what Mr. Smith that was?

A. Charles G. Smith, Jr., this gentleman sitting there. Mr. Smith told me he would like me to make some sounding for myself. He said there might have something dropped over from the lighter he did not know of, but would like me to sound. About three o'clock on that afternoon—in the morning, Friday, I told the mate when she was low down to 13 feet—Friday morning—I told him when she was loaded down to 13 feet aft to haul her back so they could work in the forward hatch, and I went down and got my dinner, and I told the mate what Mr. Smith told me about the water and about sounding, and if hauled when I was not there to be sure and sound and find the depth of the water. After dinner I went up to Mr. Lee's store again—

Mr. WILSON: I note an objection to the statement the captain makes as to the directions to his mate as incompetent and immaterial.

The WITNESS:—and came down about three o'clock on board the vessel, and the mate had just hauled her—just got her fast. I asked him if he sounded, and he told me he had.

Mr. WILSON: Note an objection to any statement made by the captain to the mate as incompetent and immaterial and not the best evidence.

The WITNESS: He told me he had thirteen feet of water. I took the lead-line and marked it off and went on board. I  
73 marked it off in feet and tied rope yarn around the lead-line, measured with my rule one foot apart, and then took the lead and sounded for myself. I commenced aft and sounded up to the mizzen rigging. The least I found was 13 feet and two or three inches, and after I got by the mizzen, that piling where Mr. Speaker told me it was dug out to, it deepened off to 16 or 17 feet. I didn't measure exactly, because there was plenty of water. The mark went down. That was Friday afternoon. We worked on in the forward hatch all day Friday.

Q. Doing what?

A. Loading stone, crushed stone, and still Saturday. Along about, I think, three or four o'clock Saturday afternoon I asked Mr. Speaker if it would bother him if I breasted her off a little aft so as we could get ready and clear the decks off when they knocked off work. He told me it would not, so I breasted her off about, well, over two feet, I suppose, further than what she was, and I sounded again and I found about 13 feet and a half of water at that time along aft, and it deepened off after we got abreast of the piling the same as it did before. Along about five o'clock I saw that the schooner was tipping to the head—or about five o'clock—between four and five. I asked Mr. Speaker if she was not on something. I thought she seemed to tip too much. He told me no; that she was on nothing. He says, Forward of the piling, that fourth piling, where it had been dug out, you won't touch her if you are full loaded on the lowest tides; just so you breast her off aft, so she don't come in aft, there is nothing to hurt you. He said to me that he was

going to knock off at 5 o'clock, that being Saturday, and she would not tip much more, anyway, and Monday morning he would put another lighter inside of us. I asked him how he was going to get the stone on board aft, after he put the lighter inside, and I said,

74 You had better knock off work now, if you are going to put a lighter in Monday morning, and not put any more stone in. He said, We are only going to work a few minutes now; it is nearly five o'clock. Monday morning we will put the lighter in. He says, You are lying all right, and I did not sound again till after they knocked off work. He worked until fifteen minutes after five and quit. After he had quit he told me he would be down there Monday morning to put another lighter — before he commenced work again. After the men had gone up to get their pay, up to the office, it came to my mind, if we waited until Monday morning, I would lose something in hauling, and if he would take the chute out that was in our hatch I would put the lighter in between that time and Monday morning and not lose any time. There was an iron chute that they put in the end of the wooden chute that extends from the building down to the hold of the vessel, and it was impossible for me to haul with that in there, and I wanted him to take that out. He said he would get some of the men to take that out. After they got their pay there was two or three men came down there and took the chute off and lowered it on our deck. After they had all went home I took the lead and sounded all around the vessel, and then it was about low water. I didn't find less than 12 feet anywhere on the inside, and I didn't find less than 14 feet and a half on the offshore side, and right over our stern, about four feet inside of our keel, there was 13 and a half feet of water.

Mr. WILSON: Over her stern?

A. Yes, sir.

Mr. WILSON: Inside of what?

A. Inside of her keel.

Mr. WILSON: There was how much?

A. 13½ feet. The men all went home then, and we lay as we were after the men had swept; when Mr. Smith's men had  
75 all gone home, our men were sweeping the decks. After they got the decks swept up I told them to try the pump, which they did. They got out, I should judge—I didn't count them; they got out about 25 strokes of water. We then got our supper, and there was nothing more done that night. Next morning we got our breakfast about seven o'clock. After we got our breakfast I told the men to try the pumps. I was sitting right by the mizzen rigging. They came out and caught the pumps and pumped about five minutes, I should think, and she did not suck. I asked them if she did not suck, and they said no—the men that was pumping. I told one of the men to run down on the stone in the forehatch and see if there was any water in her. He went down and said there was some; and I said, How much?

Mr. WILSON: Note an objection to this conversation between the captain and the men as immaterial and incompetent.

The WITNESS: He took a rake-handle that was in the hold and went just forward of the foremast and stuck it down by the keelson and showed me how much water there was on the rake-handle, putting his thumb on the mark. There was about two feet, as *year* as I can tell, right forward, but she was down by the head, so it did not make a dreadful sight of water. She was over 18 inches to two feet down by the head, I should judge. She was drawing 12 feet 10 inches of water forward. I told him (the sailor) to come out and we would catch the other pump, and he did so and we pumped about, I should judge, ten minutes, and I told him to go and see if he was gaining any on her. He went down and looked and said we gained about half an inch. He came out and we pumped on about ten or fifteen minutes longer, I should judge. I told him to look again and see if we was gaining any, and he said it was gaining on us. I then hired five colored men from the shore to come on board and help us pump, and we also started the aft pump. That was three pumps we had going on.

76 Mr. WILSON: Aft, forward, and amidships?

The WITNESS: Yes, sir. I told the steward to light the lamp and bring it down to the windlass-room with me and see whether we were gaining or not. We went down in the hold and could see it was gaining on us; the water was gaining in the hold of the vessel. I then started and went up aboard of the tugboat "Potomac," which lay just above the soap factory—I don't know the name of it—to see if he had any steam pump on board and if I could get him to come down and help us in any way. The captain was not there, but there was two men and a young youth about 15 or 16 years old, I should judge. He said he knew where the captain lived and would go and see him and ask him to come down. He went and seen the captain, and in about an hour, I should judge, the captain came down and boarded the schooner. The captain of the tug, Captain Bell, told me he had stopped on board of the tug and told them to get up steam and come down alongside as soon as they could. I asked him if he had any steam pumps and he said he had not. I asked him if he knew of any steam pumps I could get in Washington. He said he did not know of any—

Mr. WILSON: This conversation between the witness and Captain Bell is objected to as immaterial and incompetent.

The WITNESS: Unless I could get a fire-engine and he would go with me up to the engine-house—he knew where it was—and see if we could get one. We started and went off leaving all the men on board and telling them to keep the pumps going and not to let them stop. We went up to the engine-house and asked the chief in charge. He said he would go, but would have to have orders from the chief downtown, as he could not go without his permission. He telephoned downtown and they told him he could not go, but  
77 that they had a pump in the pump-house that I could have if I would get a wagon and come down after it. There were two pumps down there and I could have them. They would charge



me ten dollars a day for the pumps, and it would cost me \$2 for a man to come and show me how they worked. I asked him if they were steam pumps and he told me that they were. I then went and got a wagon and went to the pump-house. When I got there I found they were two hand pumps, the same as the two I had on board, so I didn't bring them. I left them and went back on board the vessel and they were still pumping the three pumps, and the water then was up to the lower deck. I told them it was no use of pumping any longer; they might as well stop, as she was full to the lower deck and still rising in her. We then went and got our grub, what stuff we got up in the house, so as to save what we had in the windlass-room—paint, oil, a barrel of beef and pork, and what we could save. It was about 12 o'clock when we stopped pumping. It was high water about one o'clock. After we got everything secured as best we could, safe in a safe place, we waited to see whether she was going to stand it and see what we could do, if there was anything else we could do. There was nothing more we could do, and just about five o'clock she broke in two. Her deck began to come up when she broke—raised right up—and the mainmast raised right up, so in a few minutes she parted 2 shrouds, and would have parted the others, but I got on the port side and cut the seizings on the lanyards so they would render. She kept on settling aft until she come on the bottom—aft. Her bow had been on the bottom ever since she had got part full of water forward. Her bow settled on the bottom, and her stern was tipped up until she broke; she settled down until her keel touched the bottom—aft. I then wrote to Mr. Endicott that afternoon and told him—

78 Charles G. Endicott, managing owner—what had happened, and would like him to come down as soon as possible; that was on Sunday, August the 6th. Monday morning about ten o'clock I got a dispatch from Mr. Endicott saying he could leave on the midnight train if absolutely necessary.

Mr. WILSON: Note an objection to that as immaterial.

The WITNESS: I telegraphed him to come as soon as possible.

Q. When did he come?

A. He came Tuesday morning. He arrived in Washington Tuesday morning.

Q. Do you know, Captain, of any efforts made to raise her?

A. Yes, sir.

Q. When was the first step taken?

A. I went to Norfolk to see a wrecker on August 13th—the Merritt Wrecking Co.

Q. With what result?

A. They told me—

Mr. WILSON: Objected to as hearsay.

Q. What was the result? What did you find?

A. I found the wreckers. They told me they would send a man.

Q. Don't say what they told you. What was the state of



things you found? Did you find you could get them right away or could not?

A. That was what I was going to say when you stopped me.

Q. You found what to be the case?

A. I found they would be up some time that week, and on Thursday of the same week there was a man come up to look at the condition.

Q. Well, state what happened, then.

A. He said he would report.

79 Mr. WILSON: I object to that and everything the man said.

Q. What was the result of that? Did you get any bids for raising the vessel, or what happened?

A. He did not give me any bids. He went back and reported.

Q. Do you know personally or not whether there were any bids from them?

A. No, sir; not from them; I did not.

Q. Well, state what else you know, if you know anything, about any bids. I don't really know whether you did or not.

A. Yes, sir; I know about one bid that French and Cole made. They sent that to me.

Q. They sent that to you?

A. Yes, sir.

Q. Look at that letter or paper (handing witness a paper, which the witness looks at and is afterwards handed to counsel for inspection).

Mr. WILSON: I object to the question and the offering of that paper in evidence, as no proper foundation has been laid.

Q. I understand you to say, Captain, that they said they would make a bid. Didn't you say that back there?

The WITNESS: French and Cole?

Q. Yes.

A. Yes, sir.

Q. And this is the bid they said they would make?

A. No, sir; that was Merritt that I was speaking of before. I saw these parties.

Q. You saw the——

A. French and Cole.

80 Q. You went to see French and Cole?

A. Mr. Cole, one or the other of them, were there with Capt. Burnett and Col. Vreeland.

Q. Who are they?

A. Two owners of the schooner Ellen Tobin.

Q. Two of the owners?

A. Yes, sir; they telegraphed French and Cole to come up——

Q. Never mind about that.

Q. They were on here, French and Cole, or one of them?

A. Yes, sir.

Q. And they made that bid after being on here and after being asked to make a bid?

A. Yes, sir.

Q. You received that yourself through the mail?

A. Yes, sir; it was sent here to Georgetown to me.

Mr. HAGNER: I offer this paper in evidence, marked Libellants' Exhibit No. 1, Hankins.

LIBELLANTS' EXHIBIT NO. 1, HANKINS.

French and Cole, wreckers.

The fully equipped wrecking schooner Mary A. Ivins and steam-tug Nettie.

Diving and wrecking in all its branches.

Divers and apparatur promptly furnished for all kinds of submarine work; all orders left at No. 1 Campbell's wharf, Norfolk, Va., will receive prompt attention.

NORFOLK, VA., *Sep.* 18, 1893.

Capt. John Hankins.

SIR: Your letter of the 16th received, and will say in reply that we have decided to give you a bid for removing the schooner  
81 Tobin and cargo for the sum of eight thousand dollars (\$8,000), provided you will guarantee some place that we can deposit the wreck after remove from where she is.

Let us hear from you at once, as we have other work in view.

Respectfully,

FRENCH & COLE.

Mr. HAGNER: Captain, look at these papers (counsel handing witness two papers, which he examines and passes to counsel for inspection).

Q. I hand you a paper dated Sept. 23rd, 1893. Please state what that is if you identify it.

A. Yes, sir; I identify it. It is a contract made with John B. Lord; that is my signature.

Q. You made that contract with Mr. Lord?

A. Yes, sir.

Mr. WILSON: I object to this paper being introduced in evidence as being immaterial.

Mr. HAGNER: I offer this paper in evidence too, marked Libellants' Exhibit No. 2, Hankins.

LIBELLANTS' EXHIBIT NO. 2, HANKINS.

To J. B. Lord, Dr., dealer in sand and gravel; office, room 6, No. 603 15th street northwest; hours, 12 m. to 1 p. m.; Saturdays, 12 m. to 3 p. m.; wharf, foot of 17th street N. W.; telephone No. —.

WASHINGTON, D. C., *September 23d*, 1893.

As master of the schooner Ellen Tobin, I hereby agree for and on behalf of the owners to pay John B. Lord the sum of eight hun-

82      dred dollars, provided and upon the condition only that he shall remove from said schooner the crushed stone now in her as she at present lies sunk at wharf in Georgetown, D. C., but in case said stone is not taken out down within six inches of the bottom, then said Lord is not to receive anything whatever for such work as he may do. Two weeks' time to be allowed for said work to be done; otherwise this contract to be void, time being the essence of this contract. Said stone is to be loaded on the barges of Smith & Son (Potomac Stone Co.) alongside.

The eight hundred dollars to be paid as soon as the work is done.

JOHN HANKINS.

WASHINGTON, D. C., *October 3d, 1893.*

This contract is by mutual consent abandoned and rendered null and void; nothing to be charged for the small amount of work and labor and material performed.

JOHN B. LORD.

Q. What is this (handing witness paper).

A. That is the second contract made with Mr. Lord after he threw up the other.

Q. And that is your signature to that?

A. Yes, sir.

Q. That is Mr. Lord's signature there (indicating on the paper)?

A. Yes, sir.

Q. I didn't ask you if that was his signature on the other paper. Is it?

A. Yes, sir.

Mr. WILSON: I object to that for the same reasons.

Mr. HAGNER: I offer this paper in evidence, to be marked Libellants' Exhibit No. 3, Hankins.

83      LIBELLANTS' EXHIBIT NO. 3, HANKINS.

WASHINGTON, D. C., *October 3d, 1893.*

As master of the schooner Ellen Tobin I hereby agree for and on behalf of the owners to pay John B. Lord the sum of twelve hundred dollars (\$1,200), provided and upon the condition only that he shall remove from said schooner the crushed stone now in her as she at present lies sunk at the wharf in Georgetown, D. C., but in case said stone is not taken out down within six inches of the bottom then said Lord is not to receive anything whatever for such work as he may do. Three weeks' time to be allowed for said work to be done, otherwise this contract to be void, time being hereby declared and made the essence of this contract; said stone is to be loaded on the barges of Smith & Son (Potomac Stone Co.) alongside. The twelve hundred dollars to be paid as soon as the work is done.

JOHN HANKINS.

WASHINGTON, D. C., *November 1st, 1893.*

Received of Mr. Charles G. Endicott for and on behalf of the owners of the schooner Ellen Tobin twelve hundred dollars in full of all charges for and on account of labor performed on said schooner in taking out the crushed stone under the within contract and of all accounts to date, and if it should prove that said crushed stone has not been taken out within six inches of the bottom on an average then I agree to take it out down to that average.

JOHN B. LORD.

Q. Now, look at that paper (handing witness paper, which he examines and passes to counsel for inspection).

A. Yes, sir; that is a letter that French and Cole wrote me.

Q. Now, Captain, this letter, what is that?

A. That is the letter French and Cole wrote me at Georgetown.

Q. You received that from them?

A. I did, sir.

Q. That is a little lower bid?

A. Yes, sir.

Q. Can you tell me whether or not Mr. Lord had already gotten to work on this second contract we have gotten here prior to your receipt of that letter of the second and lower bid?

A. Of the last contract?

Q. Whether that had already been signed when you got that letter?

84 A. Yes, sir; it had. I think it was the day before. It was a short time before.

Mr. HAGNER: I offer this letter in evidence, to be marked Libellants' Exhibit No. 4, Hankins.

#### LIBELLANTS' EXHIBIT NO. 4, HANKINS.

French and Cole, wreckers, etc.

NORFOLK, VA., *Oct. 2, 1893.*

Mr. John Hankins, Washington, D. C.

DEAR SIR: I write to you to know what they have decided to do with the schooner Tobin. We wrote several days ago and have received no reply. After considering the matter we have decided there is no value there for the owners to amount to anything, and we have decided that we can do that job for seven thousand dollars (\$7,000). If we can know in the next ten days, before the cold weather sets in to make ice, then we would not want it at that price. When we say seven thousand dollars we mean for you to secure some place near by to put what portion of the wreck that we would want to put out the way of navigation. Please let us know at once.

Respectfully,

FRENCH & COLE.

Mr. HAGNER: The paper marked Exhibit B to the libel is hereby admitted in evidence by consent.

85 Q. Do you know of that money being paid and receipted for in Exhibit No. 3?

A. Yes, sir.

Q. Captain, when you mentioned the fact that Mr. Charles G. Smith, Jr., told you to sound, what did he say? Please state his exact words as well as you can.

A. When I asked him how much water there was he says, We had it dug out to 14 or 15 feet at low water, but I would like you to make some soundings for yourself. He said there is not less than 14 feet.

Q. Well, you sounded accordingly?

A. I did.

Q. Where did you sound?

A. All around the vessel.

Q. You sounded all around the vessel?

A. Yes, sir; from one end of it to the other on both sides.

Q. Why did you sound around the vessel?

A. I won't say all around, but from one forerigging around to the other forerigging.

Q. Why did you sound all around?

A. To see what kind of bottom there was.

Q. Had, or not Mr. Smith spoken of the condition of the water in the middle of the berth?

Mr. WILSON: That is objected — as leading.

A. Mr. Smith told me it was dug out to that piling; that is in April.

Q. And that was your reason for sounding around and not under the vessel?

A. I could not sound under the vessel; it was impossible to sound under. I could sound all around, which I did, and  
86 found nothing to hurt the vessel nowhere I could sound.

Q. You said that after 25 strokes were given from the pumps, or about that number, it sucked. What do you mean by that?

A. It sucked air; you could not get any more water.

Q. What did that indicate?

A. That there was no water in the hold of the vessel.

Q. That there was no water in the hold of the vessel at that time?

A. Yes, sir.

Q. You stated you sounded near the mizzen rigging. Please explain to me what that rigging is.

A. The rigging of the aft mast that comes down to the side; that rigging off the aft mast.

Q. You did not sound aft of the rigging of the aft mast?

A. I sounded abreast of it.

Q. Did you sound inside or outside the vessel?

A. Both.

Q. You sounded on both sides?

A. Yes, sir.

Q. You sounded inside and outside aft of the mizzen rigging?

A. Yes, sir; and forward of it, too.

Q. On both sides or one?

A. Both.

Q. How long, Captain, have you been captain of the Ellen Tobin?

A. Nine years last April.

Q. What was her character as a vessel—good, bad, or indifferent?

A. She was a good vessel.

Q. Do you know when she was built?

A. She was built in 1874.

Q. Do you know where?

A. Kennebunkport, Maine.

87 Q. Was she or not staunch when she left Fort Washington, on the Potomac river, for the port of Georgetown on or about the 2nd day of August, 1893?

A. She was.

Q. Was she or not suitable for the service for which you were engaged by Mr. Smith?

A. Yes, sir; she was. She ought to have been, when she was suitable to bring perishable cargo to Fort Washington.

Q. You have already stated her cargo to Fort Washington was cement?

A. Yes, sir.

Q. Was there any leakage during her voyage to Fort Washington?

— No, sir; there was not one barrel damaged.

Q. Does this cement require a very dry vessel or not?

A. Yes, sir; it won't do to let any water get to it, or it will spoil it.

Q. Where did you first see Mr. Speaker?

A. I saw him on the dock.

Q. What dock?

A. Mr. Smith's dock; there at the stone-crusher.

Q. Where did you see him to know him?

A. There on the dock; that night when I went around to see whether there was a berth or not, and I inquired for the foreman of the dock, and they introduced me to Mr. Speaker.

Q. Who introduced you?

A. I don't remember the man. I inquired for the foreman, and he told me that was the foreman, Mr. Speaker.

Q. What did you do then?

88 A. I went to him and asked him if we could get into the berth. That was the night we lay at the soap factory.

Q. Do you happen to know whether or not she was insured?

A. I don't think she was.

Q. You don't think she was; but you don't know?

A. No, sir.

Q. Are you familiar generally with the value of vessels of that character, Captain?

A. I think I ought to have some knowledge of it. I have been going to sea for 27 years.

Q. What do you regard the Ellen Tobin to be worth immediately preceding her sinking in the dock at Mr. Smith's wharf?

A. I think the Ellen Tobin would be worth \$10,000.

Q. Immediately preceding the injury?

A. Yes, sir.

Q. Do you or not regard that as her market value at that time?

Mr. WILSON: That I object to as leading.

A. I do. She would pay twenty per cent. of that amount clear of all her bills. I call that pretty good property.

Q. Twenty per cent. in what length of time?

A. A year.

Q. Where did you last see the Ellen Tobin?

A. At Alexandria, Va.

Q. When?

A. Yesterday.

Q. Did you examine her?

A. I did, inside and out.

By Mr. BARNARD: What was the condition of her bottom?

A. She was broken right in two in the middle of her, seven  
89 feet forward from the aft end of her centerboard well, and she was bent up 21 inches in the center. She did not touch the dock, anyhow. She is lying on a straight dock, and she did not touch the dock by 21 inches.

Q. At what point?

A. In the bend where she is broke. She has been laying there seven days, and of course she has come back considerably in that time. Her weight would naturally bring her back. I can see she has come back a good deal by going on deck.

Q. What did you ascertain of her condition when you went down inside of the vessel?

A. I found three hanging knees broken off between deck on either side. I found two deck knees broken in the end, and I found four hanging knees broken on the port side in the lower hold, and five broken on the starboard side in the lower hold, and one deck beam broken off in the lower hold. I found the keelson and sister keelson broken in the lower hold about seven feet from the aft end of the center well—broken right in two; what you might call a clear break.

Q. In what relation as to position did that break in the keelson have to the break outside?

A. It was right under that; it broke right through the keel, the keelson, and sister keelson, and the keelson is three feet high and fifteen inches wide.

Q. Had she been a frail vessel could she have retained the position that she held yesterday when you saw her?

Mr. WILSON: I object to the question as immaterial and incompetent.



A. No, sir.

Q. Why not?

90 A. Because if she had been a weak vessel she would have sprung back; she would have struck the dock.

Cross-examination.

By Mr. WILSON:

Q. On what voyage did the schooner sail before her voyage to Fort Washington?

A. She took two hundred tons of gravel to Norfolk and a load of coal to Lambert's Port, to New London.

Q. What was her voyage before that?

A. Load of coal.

Q. Where and when?

A. I carried a load of coal, but forget where I took it.

Q. Where did you carry it from?

A. I carried it from Baltimore.

Q. When was the schooner last in Baltimore?

A. She was in Baltimore on June; I think it was June 3.

Q. '92?

A. 93.

Q. June 3rd, 1893?

A. Yes, sir; June 3rd, 1893, I was in Baltimore.

Q. How long were you there?

A. I don't know exactly how many days I was there.

Q. About?

A. I think I was there about three days.

Q. When was the vessel last repaired and where?

A. A year ago.

Q. And where?

A. Jersey City; a year ago in July, I think; July or August.

91 Q. What repair- were done to her?

A. All that was needed. She was hauled off and the bottom painted and everything done that was necessary.

Q. What accident happened to the vessel prior to her being sunk?

A. Happened to her?

A. At any time when you were on board of her?

A. There was no accident since I have been aboard of her, with the exception of a little fisherman went across her bow about three years ago, and, I think, that was the only accident I remember she was ever in.

Q. Did anything happen to her when she was in Baltimore?

A. No, sir.

Q. Did she sink there?

A. No, sir.

Q. Did she leak there?

A. No, sir.

Q. Were any repairs made on her there?

A. No, sir.

Q. When was she in Baltimore prior to June, 1893?

A. June, 1893?

Q. Yes, sir.

A. She was there in February; I guess she left there in February. I got outside of the beach the 4th day of March.

Q. What beach?

A. Cape Henry.

Q. How long were you there then?

A. I don't remember exactly how long I was there.

Q. As near as you can tell?

92 A. From two to three days, as near as I remember. We got an ordinary dispatch. We did not have any great detention and I don't think we got any extraordinary good dispatch.

Q. How long had the mate been on the vessel at the time this accident happened?

A. He shipped with me, as I told you, on the 3rd day of June.

Q. Where is the mate now?

A. I suppose he is in Charleston. He was in a vessel going to Charleston.

Q. How was the Ellen Tobin rated?

A. She rated A1 with a red star until 1890, and then her rate run out and we didn't have her rerated again.

Q. So that at the time she sunk she was not rated at all?

A. No, sir. But the insurance inspector saw her every time she was on the dock. He was there the last time. The insurance agent was the inspector.

Q. By whom was she repaired in Jersey City?

A. The last time we had it done by Michael Allison and Son; the Allison Dry Dock Co.

Q. Of Jersey City?

A. Yes, sir.

Q. What did the repairs cost at that time—do you know?

A. No, sir. I don't know. The bills went to Mr. Endicott, the gentleman who was the managing owner.

Q. Mr. Lee in Georgetown was your broker, I understand you to say?

A. Yes, sir.

Q. What compensation did you pay him?

A. I was to pay him one and a half per cent. on the coal.

Q. How much on a cargo generally?

93 A. A general cargo everywhere else is five per cent. I didn't ask him what he got for general cargo and didn't ask what he would charge me on this load of stone.

Q. You employed him as your broker, I understand you to say?

A. Yes, sir; I did.

Q. What time did you arrive at the wharf of the respondents, Smith & Son?

A. What time?

Q. Of the day, the time of the day.

A. What time of the day? It was sunset when we got to the wharf; about sunset or a little after.

Q. You didn't see Mr. Smith that afternoon?

A. No, sir.

Q. Nothing was put on board that evening?

A. No, sir.

Q. You began loading what time?

A. Thursday morning.

Q. Thursday morning?

A. Yes, sir.

Q. When you got the vessel into her berth at the Smith wharf, how much water did your vessel draw?

A. She drew 2 inches less than eight aft and about seven feet forward.

Q. That was her draught when she went in?

A. Yes, sir.

Q. How much water did she draw on Thursday night?

A. I don't know exactly how much she did draw.

Q. How much water did she draw, can you state, at any time on Thursday?

A. No, sir; I cannot, because she was loading all the time and coming down.

94 Q. How much water did she draw on Friday morning?

A. I don't know how much on Friday morning.

Q. Friday you didn't take any record of what she drew?

A. No, sir.

Q. The loading continued all day Friday?

A. No, sir.

Q. Did not?

A. No, sir; not in the aft-hold.

Q. Did the loading of the vessel continue all day Friday?

A. Yes, sir; it did, but not in the aft-hold.

Q. On Friday evening when work stopped how much water did you draw?

A. On Friday evening I don't know exactly what she did draw. At half past two she drew 13 feet aft.

Q. How much forward?

A. She was drawing about eight feet and one-half forward.

Q. She was drawing eight feet and one-half forward at two o'clock?

A. About half past two—somewhere about that.

Q. 13 feet aft then?

A. Yes, sir.

Q. And how much forward?

A. Eight and a half feet forward.

Q. How much did you draw Friday evening when work stopped?

A. I didn't look to see what she was drawing.

Q. You didn't look to see what she was drawing?

A. I didn't; no, sir. We were working in the forward hatch and she was coming up on even keel.

Q. On Saturday morning when you began the work of loading how much did she draw?

- A. I don't know how much she drew Saturday morning.  
Q. You didn't make any measurements?  
95 A. No, sir.  
Q. And no examination?  
A. No, sir.  
Q. And you don't know?  
A. No, sir.  
Q. How much on Saturday noon?  
A. Saturday noon?  
Q. Yes, sir.  
A. She was drawing about 11 feet 4 inches.  
Q. Aft?  
A. Forward.  
Q. How much aft?  
A. I don't know exactly how much she was drawing aft.  
Q. Forward how much?  
A. 11 feet 4 inches, about as near as I can tell.  
Q. Saturday afternoon when you stopped work?  
A. She was drawing 12 feet 10 inches.  
Q. Aft?  
A. Forward.  
Q. How much aft?  
A. She was drawing about 10 feet—ten to eleven feet—ten feet  
ten.  
Q. Are you making these statements as to the number of feet she  
drew at these various times from your recollection?  
A. Yes, sir.  
Q. Did you make at the time any record or memoranda as to the  
number of feet she drew?  
A. No, sir; I did not.  
Q. Did you make any record or memoranda of any measurement  
as to the number of feet and inches she drew at any time from the  
time she arrived at the wharf until the vessel sunk?  
96 A. No, sir.  
Q. How much water did she draw on Sunday morning?  
A. She was drawing the same as she did Saturday night.  
Q. Did you make any measurements Sunday morning?  
A. I did not measure. All you had to do was to look at the  
mark.  
Q. Did you look at the mark?  
A. Yes, sir.  
Q. You saw the mark, and it was the same as it had been Friday  
morning?  
A. It was the same forward. I didn't look aft Sunday morning.  
Q. What was the depth of water after she sunk, as shown on her  
stern and bow?  
A. By her marks you mean?  
Q. Yes, sir.  
A. There was no mark up as high as that; she was all under.  
Q. What was her highest mark?  
A. 14½ feet was the highest mark aft and 13½ feet forward.

Q. And you say that when she sunk all the marks were under the water?

A. Yes, sir.

Q. Did you measure to see how much under water they were?

A. No, sir.

Q. Have you any idea?

A. I could not measure to see, because we could not find the marks. They were cut on just small.

Q. You knew where they were and could easily tell the whole number of feet from the bottom up to the surface of the water?

A. From the bottom of the river you mean?

Q. Yes, sir.

A. I could have measured the bottom of the river; yes, sir.

Q. You have no idea how deep the water was at the bow or stern?

97 A. About 18 feet forward; I don't know exactly. It was clear up in the hawse pipes when she went down; that was about 5 feet above the 13½-foot mark.

Q. Then, in the stern, what was the depth aft—about?

A. On the outside it was about 15 feet.

Q. Did you measure?

A. Yes, sir.

Q. And found the water 15 feet?

A. Yes, sir. Only outside. There was about 13 feet on the inside when I measured.

Q. Please tell me again how much water was at the bow and how much at the stern the last time you measured before she sunk.

A. The last time I measured before she sunk was about Saturday night, after we quit work, about six o'clock; then it was about dead low water. I sounded on both sides and I didn't find less than 12 feet of water aft abreast of this piling I speak of, and after I got to this piling I didn't find less than 15 feet, and on the other side I didn't find less than 14 feet of water, and after I got opposite the piling it went to 17 or 18 feet. I thought there was no danger, and Mr. Smith told me if I breasted off there there was nothing to hurt me.

Q. On Saturday afternoon, when you stopped, what was the condition and position of the schooner?

A. The condition of the schooner was good. She was laying there. We pumped her out as soon as we stopped. She had no water in her and she was lying, I should judge, from 20 to 24 inches by the head, low down by the head, and she was drawing at that time 12 feet and ten inches of water forward, and Mr. Speaker and I was looking from the dock to see how much water she was drawing.

98 Q. Was she afloat then?

A. I don't know whether she was when we knocked off or not.

Q. What is your best knowledge?

A. I think she was not afloat, and I asked Mr. Speaker if she did not touch something, and he said no, and that was the reason I sounded

after six o'clock, and after I sounded it convinced me she was afloat, because I didn't strike any shallower water than what floated her,

Q. Your own opinion was she touched?

A. I thought so before I sounded.

Q. And you sounded carefully all around?

A. Yes, sir.

Q. As carefully as any one could do it?

A. Yes, sir.

Q. And you found nothing to make you think she touched?

A. No, sir.

Q. How did she lie at that time in respect to the wharf? That was on Saturday afternoon when you quit work. Was she close up to the wharf?

A. No, sir; there was a lighter lying inside of us all the time she was there.

Q. How did she lie in respect to the lighter?

A. We breasted her off so she was six feet from the lighter aft and forward, just enough off so the lighter could work between her, and after we breasted her off she was about six feet clear of the lighter at the mizzen-rigging.

Q. How far breasted off forward?

A. It must have been about 20 feet.

Q. 20 feet from what?

A. The dock.

99 Q. How far from the scow?

A. Two feet between the scow and the schooner, so that — scow could haul off and out nicely.

Q. How was she held off from the wharf?

A. By a pole we had laid alongside of the lighter.

Q. What kept the forward part of the schooner off? The pole, I understand you, was aft.

A. It had been forward until Saturday.

Q. When was the pole put on the schooner and where was it placed?

A. It was put on when we first went there.

Q. Where was it placed?

A. It was placed just forward of the forehatch.

Q. How long did it remain there?

A. Until Saturday.

Q. Where was it then changed to?

A. It was changed forward of the mizzen-rigging. You asked me how we breasted her off. That pole—there was only one pole—that pole was made fast right by the forward end of the forward hatch by a bit that breasted her off as far as we wanted her and made that fast. Then we had a line from the bow, and when we wanted to breast her off aft we hauled in the line.

Q. How did you do it on Saturday afternoon?

A. After they took the lighter in from there—if there was two lighters in there we could keep her away. When we shoved the pole we had not shoved it before.

Q. As a matter of fact, when you quit work there was only one lighter between the vessel and the wharf?

A. Yes, sir.

Q. And the pole on the aft end of the schooner?

100 A. Yes, sir.

Q. When did you put it in that position?

A. We put it in there Saturday.

Q. What time?

A. I don't know exactly.

Q. By whom was it done?

A. Mr. Smith's men helped to put it there. It was right over the lighter, and when we wanted to take it aft his men helped our men to take it aft. Our men carried the part at the vessel and his men carried the end on the lighter, and they walked right agon- with it.

Q. When did you first see either of the Mr. Smiths?

A. Friday.

Q. Do you remember what time?

A. A little before noon I saw this Mr. Charles Smith.

Q. Did you ever see his father?

A. I met him afterwards.

Q. Not before this accident occurred?

A. No, sir.

Q. And the only time you saw this Mr. Smith here, Mr. Smith, Jr., was on Friday?

A. Yes, sir.

Q. At Mr. Lee's store?

A. Then I saw him on the dock again. He walked down the dock where we were to work.

Q. The same day?

A. I think it was just before night.

Q. You didn't see him at any other time before or after Friday?

A. I don't remember that I seen him Saturday or not.

Q. You don't remember?

A. No, sir.

101 Q. When you first saw him at Mr. Lee's store he said to you they had the river dredged out in front of the wharf?

A. Yes, sir.

Q. He had that dredged out?

A. Yes, sir.

Q. What was the first inquiry you made of Mr. Smith?

A. I think I asked him how long he was going to be loading before he finished.

Q. He told you?

A. Yes, sir; what time he thought it would be.

Q. Then what did you say?

A. I told him I hoped he would. I would like as good dispatch as I could get.

Q. Then what did you say?

A. I asked him how much water there was at the dock.

Q. You had been lying then for nearly two days there?

A. One and a half, nearly.



Q. And he told you he would like you to sound for yourself?

A. He said he would like me to make some soundings for myself.

Q. That was what time of the day?

A. I think it was a little before noon. I should judge about 11 o'clock.

Q. What did you say in reply to that advice of his?

A. I told him I would.

Q. And did you do it?

A. I did.

Q. Immediately?

A. No, sir; not immediately.

Q. When?

A. I did that afternoon.

Q. What time?

102 A. I sounded the first time along about two or three that afternoon. I went and got my lead line and marked it off in feet.

Q. The way you described?

A. Yes, sir.

Q. Will you tell us exactly where you sounded in respect to the vessel?

A. I commenced right aft of the quarter on the starboard side, and when I sounded about every four feet, as near as I can state, with the lead, these marks on it I spoke of, I dropped it right straight up and down and walked right along the deck on the vessel, and dropped the line just so it was against her side up to the forerigging on the starboard side. Then I took the lead line in and went on the port side and did the same.

Q. So the only part you did not sound around the vessel was between the forerigging and the stem?

A. That was it; yes; I didn't sound there.

Q. What distance is that?

A. I should — about 12 or 15 feet.

Q. Did you make any memoranda of the soundings?

A. No, sir.

Q. Will you state now as definitely as you can what they were?

A. What do you mean, the number of feet?

Q. Yes.

A. When I sounded the first time I speak of there was almost thirteen feet, lacking about an inch, until I got abreast of this piling I spoke of, which Mr. Smith said it had been dug out to.

Q. You mean Mr. Speaker?

103 A. Mr. Speaker and Mr. Smith also said that when he came down on the dock that afternoon.

Q. I am speaking now of what you found?

A. I found about 13 feet or within an inch or so of it, just down all the way until I got abreast of this piling. After I got there there was about 16 feet from there to the forerigging. It would vary a few inches in different places.

Q. Did the result of that examination satisfy you you were all right?

A. Yes, sir.

Q. Plenty of water?

A. Yes, sir.

Q. All around the vessel?

A. Yes, sir.

Q. Did you see Mr. Smith after that?

A. After what?

Q. After you had sounded.

A. I don't think I did see him after that.

Q. Did you see him before that?

A. Yes; I either seen him before or after, but I don't know which. It was that afternoon. He walked down the wharf. I think he was on the dock just before I sounded.

Q. Was he there while you were sounding?

A. I don't think he was.

Q. You didn't have any conversation with him at any time after you finished the soundings—at any time?

A. I don't remember that I did.

Q. Well, according to your recollection, you did not?

A. No, sir; I don't think I did.

Q. And that was on Friday?

A. Yes, sir.

104 Q. You were then loading the rest of the afternoon, and stopped what time?

A. Two o'clock, and hauled back there.

Q. At 2 o'clock you hauled back there so the loading would be in the forward hatch?

A. Yes, sir.

Q. How many tons of stone do you suppose you had on, on Friday night?

A. Well, all I could tell was what they told me at the stone-crusher on the wharf. They said they had near——

Q. Your own judgment I want.

A. I could not tell within several tons. If she had been on an even keel I could have told, but not under those circumstances, she being loaded on one end.

Q. Then on Saturday morning you began work?

A. Yes, sir.

Q. Supposing you had plenty of water?

A. Yes, sir.

Q. All around?

A. Yes, sir.

Q. And you made no soundings on Saturday morning again?

A. No, sir.

Q. What was there that called your attention to the condition of the vessel that made you think she had touched?

A. Because I thought she was tipped more in the head than she should have been.

Q. That is bow down?

A. Yes, sir; by the way the stone was going in.

Q. When you quit work on Saturday afternoon, was there after that time anything done towards the removal of the chute which carried the stone into the vessel?

105 A. Yes, sir.

Q. About what time?

A. Well, I should judge somewhere about six o'clock.

Q. Was there at that time, about six o'clock, any additional scow near by or put in a position where it could easily interpose between the scow at the wharf and the schooner?

A. There was none put there; no, sir.

Q. Was there one there?

A. There was one laying up above which Mr. Speaker told me I could have to put in.

Q. How far was it above—near by?

A. I suppose about 100 feet.

Q. When did he say to you there was a scow near there you could have?

A. Saturday night.

Q. About what time?

A. Just before we knocked off work, when I was talking to him, asking if she was not on something—if she tipped.

Q. And he told you there was that scow over there you could have?

A. After that, after he said he was going to put it in, that was the first time that I knew but what we had to load under the chutes to chute it in the hold. Of course the scow could not be put in there when the chute was there?

Q. The chute was taken out in order that the scow could be put in?

A. He didn't take it out, but I asked him. He went away and left it there in the hold.

Q. You asked him to take it out and asked him about the scow?

A. I asked him where the scow was. If he would leave one there I would put it in before that time and Monday morning, so we would lose no time. He showed me a scow, a lighter above Mr. Lee's, and told me I could take it.

106 Q. Did you take it?

A. No, sir.

Q. Did you say anything to him, and did he say anything to you as to when you would shove her out?

A. No, sir; only I said I would have her in Monday morning.

Q. When did you say you would put the scow in or shove the schooner off?

A. I told him between that time and Monday morning.

MR. HAGNER: I want to object to that question as one which no witness could answer.

Q. When was the tide high that night?

A. About 12 o'clock.

Q. Where were you at 12 o'clock?

A. Aboard the vessel.

Q. Whereabouts?

A. In my berth.

Q. When did you retire for the night?

A. Between nine and ten o'clock; I don't exactly remember.

Q. Did you at any time during the night or before Sunday morning to put the scow in or shove the vessel off?

A. No, sir. Between Saturday night, do I understand you?

Q. Or Sunday morning.

A. No, sir; I didn't think it was necessary.

Q. Or any time during Saturday night?

A. No, sir.

Q. Why not?

A. Because I didn't think it was necessary. Mr. Speaker told me there was no danger laying where we were, and I had also  
107 sounded around the vessel and found water enough around her; that was the reason I did not.

Q. When did you intend to move the schooner out?

A. I thought probably I would do it Sunday. It would be owing to the weather, winds and weather. I might have done it Sunday. I don't like to work Sunday, but if it had been fine weather, with not much wind, so she could haul easy and shove her off, I would have done it Sunday. If it had been blowing I would have waited until Monday morning.

Q. How long would it have taken you to have shoved her off and put in the scow?

A. Probably it would take me an hour.

Q. As long as that?

A. Probably it would take me an hour to slack the lines and shove the vessel off and put in the scow.

Q. During all of Saturday night you knew of nothing being wrong in the position of the vessel or as to her condition?

A. No, sir.

Q. When did you first suspect she was leaking?

A. When we tried the pumps.

Q. What hour?

A. Between half past seven and eight. We had breakfast about seven and we then tried the pumps.

Q. Between seven and eight o'clock?

A. About half past seven, I should judge.

Q. And what time was it when you went down below deck into the hold to see what was the matter?

A. It must have been about 20 minutes. I did not go myself, but sent a man; about twenty minutes after that, I suppose.

Q. Could you see anything to account for the leak?

A. No, sir; nothing more than I seen she was tipping on  
108 down forward, and as the water came in it seemed she was was on a rock. I tried to breast her off, tried to see if she was afloat, and found she was not.

Q. When was that?

A. As soon as she commenced to leak that morning.

Q. You tried then to breast her off?

A. I tried the pole to see if she was afloat.

Q. And was she?

A. No, sir.

Q. And then you tried to breast her off?

A. No, sir; not when she was not afloat.

Q. Did you make any effort to get her off?

A. I tried to shove her off with the pole, but I could not shove, and found she was fast on the rock.

Q. What kind of a pole?

A. The one that was on the tackle. That was the only thing we had to breast her off with.

Q. That was the one you used in trying to get her off?

A. Yes, sir.

Q. What time was that, did you say?

A. It must have been somewheres about eight o'clock in the morning.

Q. And you could do nothing with it?

A. No, sir.

Q. Could you tell where the water was coming in?

A. I could see it was making a leak in between decks. It was raising in there so the water was coming in. I could see at the top of the centerboard well that she was leaking there.

Q. When you first went down was she leaking at the top of the centerboard well?

A. Yes, sir. The stone was up in the lower part of it. You could not see but just the top of it.

109 Q. Did the water thrust the seams apart and the water come in?

A. The seams had opened enough to let the water in.

Q. What part, fore or aft?

A. In the upper part; the top seam of the centerboard well all the way along.

Q. How long was the centerboard well?

A. 26 feet.

Q. That was when the water was coming in you could see the centerboard well, in the middle of her?

A. And aft, too.

Q. You say it seemed she was on a rock. Did you think so at that time?

A. I thought it must be a rock.

Q. What made you thing so?

A. Because there was nothing all around us. It must be something in the middle; it must be a small rock or something else.

Q. Did you sound down the centerboard well?

A. No, sir; you could not sound down the centerboard well.

Q. Where was the centerboard then?

A. In the centerboard well?

Q. Was it up or down?

A. Up.

Q. Fastened up?

A. Yes, sir.

Q. How long had it been in that position?

A. It had been in that position since Tuesday morning; since we towed up the river from Fort Washington.

Q. All the way up?

A. Yes, sir.

110 Q. How long was it from the time you first found the vessel was leaking until she sunk?

A. Four and a half hours until she was full at the upper deck.

Q. What time of day was it when she touched bottom?

A. She touched bottom all day.

Q. From what time?

A. From half past seven o'clock up to the time she was taken away from there. I don't know how much; I suppose all the time.

Q. When the tide was up full tide was she afloat or touching then?

A. Sunday?

Q. Saturday night; between Saturday and Sunday.

A. I don't know.

Q. You don't know.

A. No, sir.

Q. You don't know when she first touched the rock, if there was any rock there—that is, when you were asleep or awake?

A. No, sir; I don't know when she first touched.

Q. And from the time you got up, which was between seven and eight, was it?

A. I got up a little after six,

Q. From the time you got up until the time the vessel finally reached the position she got and kept on the bottom, was how long?

A. From seven o'clock in the morning until about five o'clock she broke in two. She kept on settling until six or seven o'clock that night.

Q. Were you on board when she broke in two?

A. I was, sir.

Q. What were you doing then?

A. I was not doing anything at the present time she broke.

Q. Waiting for her to break?

111 A. Seeing what she would do.

Q. Then she broke about five?

A. Yes, sir.

Q. And then what did you do?

A. Got everything out of the cabin, out on top of the cabin.

Q. From the time she sunk Sunday evening, August the 6th, was it not?

A. Yes, sir.

Q. From the time that she sunk, at six o'clock on Sunday evening, August the 6th, I wish you would state exactly what was done by you towards raising her or getting out her cargo.

A. From six o'clock Saturday or Sunday night?

Q. Sunday night, from the time she sunk?

A. There wasn't anything done towards getting out the cargo.

Q. What did you do on Monday, the next day?

A. I didn't do anything.

Q. What did you do on Tuesday?

A. I came down to the depot and met Mr. Endicott Tuesday morning at eight o'clock.

Q. What was done on Wednesday?

A. I came to the depot to go home; on Wednesday I think I did.

Q. Did you go home?

A. No, sir; Mr. Endicott went home.

Q. When was the first thing done towards making an effort to raise the vessel or to get out the stone?

A. Mr. Endicott came on Tuesday, and on the Thursday following I went to Norfolk.

Q. I am talking about work actually done on the vessel.

A. On the 23rd day of—when I make the contract with Mr. Lord.

Q. I am asking you about the fact, not about the paper.

A. I cannot remember the date when the first thing was done.

112 Q. You have a right to look at that paper to refresh your recollection.

A. We made a contract with him on the 23d of September, which was Saturday.

Q. The next month?

A. Yes, sir.

Q. I will ask you again what date the work was actually begun of moving the stone.

A. Monday, the 25th.

Q. Monday, the 25th, was the first day anything was done towards getting out the cargo by way of actual work, was it not?

A. Yes, sir; that was the first actual work done aboard the vessel.

Q. How long did that actual work continue?

A. Until Thursday.

Q. That was Monday, was it, Tuesday, Wednesday, and Thursday?

A. Tuesday, Wednesday, and Thursday.

Q. What happened then?

A. He gave up the contract and took his scow down the river.

Q. When was the next thing done in the way of actual work?

A. I don't exactly know the date he did begin actual work the next time.

Q. State as near as you can.

A. About the 10th.

Q. The 10th of October?

A. Yes, sir.

Q. How long did he continue?

A. He continued till he finished.

Q. How long, about, was that?

A. November the first.



113 Q. November the first?

A. Yes, sir.

Q. Then the work of getting the cargo out was completed?

A. Yes, sir.

Q. What was the next thing done in regard to removing the vessel and getting her away from that place?

A. There was a survey held.

Q. When was the next thing done in the way of actual work towards the removal of the vessel or raising her or getting her away from the wharf?

A. I don't know the date. I was not here. I don't know.

Q. You were not here?

A. No, sir. I don't know when the next actual work was commenced.

Q. You don't know when they pumped her out?

A. No, sir; I was not here.

Q. When did you see the vessel next?

A. I saw her Tuesday before Thanksgiving. I forget the day of the month.

Q. Where was she then?

A. About half way from Georgetown down to the bridge, sunk.

Q. When did you see her next?

A. Yesterday.

Q. In the meantime she had been taken down to Alexandria and put in the dock—Agnew's?

A. Yes, sir.

Q. Where she now is?

A. Yes, sir.

Q. Were you notified by anybody to get the schooner away from the wharf before you went away?

A. I was not; no, sir.

Q. Did you know of any information being given?

114 A. I never saw any.

Q. Did you hear of any?

A. Yes, sir.

Q. Who did you hear it from?

A. I heard Mr. Hagner say Mr. Endicott had got one.

Q. From whom?

A. From Mr. Smith or his attorney.

Q. From anybody else?

A. No, sir.

Q. You never heard of any notification being given by anybody else?

A. No, sir.

Q. Nobody notified you at any time of any complaint?

A. No, sir.

Q. From the time she sunk, then, until the date of this contract with Mr. Lord nothing whatever was actually done in the way of taking out the cargo or raising the vessel in the way of actual work?

A. Yes, sir; we were trying to get some one to do the work of raising the vessel.

Q. In the way of actual work?

A. No, sir; not in the way of actual work on the cargo itself there was not.

Redirect examination.

By Mr. HAGNER:

The WITNESS: The bow was up the river. The bow of the schooner was pointing up the river all the time while she was at the dock.

Q. Do you remember the name of the place she was repaired a year ago?

A. Allison's.

115 Q. Where is Allison's?

A. In Jersey City.

Q. When was it repaired before that?

A. A year before that.

Q. Where was that?

A. I don't remember.

Q. How do they gauge the amount of stone over there at the wharf? Do they measure it or weigh it or what?

A. Mr. Smith?

Q. Yes.

A. I judge they measure it and get how many tons there is by the yard.

Q. Was it measured or weighed in the stone-crusher itself, if you know?

A. I don't know.

Q. You stated the vessel was sunk on a rock. I want to ask you if you took occasion to find out whether she was sunk on a rock as soon as she was gotten up.

Mr. WILSON: I object to that as incompetent upon redirect.

A. I did.

Q. What is that that I hold here (showing witness a long wooden pole about two inches thick by about 12 or 15 feet long)?

A. That is the stick I measured with.

Q. See if you find any of your own writing on it.

A. That is my name and date, Nov. 28th, 1893, that I wrote (indicating writing on the stick).

Mr. WILSON: I object to that as incompetent.

116 Q. That you wrote?

A. Yes, sir.

Q. Just state now at what depth under the surface of the water you ascertained the rock to be.

Mr. WILSON: I object to that question as leading and incompetent.

Q. State if you located the position that the center of the vessel was in where it was raised up.

A. Where the vessel was raised up?

Q. Yes, sir.

A. Yes, sir.

Q. State if you measured the depth of water at the place where you located it and what depth you found.

A. Yes, sir; I did. I sounded there with a diver at the bottom to hold the stick on the rock at 11.15 a. m. November 29th, and found 12 feet and  $6\frac{3}{4}$  inches of water on the rock at that time. At one o'clock p. m. it was high water, and the tide had raised 11 inches from the time I measured until high water, which made 13 feet and  $5\frac{3}{4}$  inches on top of the rock at high water.

Q. What were the conditions you found there when you——

Mr. WILSON: I object to that as leading and incompetent.

Q. What were the conditions you found when you put that pole down there and what was the result?

Mr. WILSON: I object to that as immaterial and incompetent.

A. I found a hard rock at the bottom of the river that the pole struck on.

117 Q. How could you tell that?

A. I took the pole and jammed it on the end and found it hard. You could hear it sound.

Q. Could you approximate the size of the rock?

Mr. WILSON: Objected to as incompetent, immaterial, and leading.

A. Well, I could not tell exactly how big it was, but I sounded and found the rock was from 8 to 10 feet or 12 feet wide and five or six feet high.

#### Recross-examination.

By Mr. WILSON:

Q. What was this stick that Mr. Hagner has shown here?

A. That was the stick that we sounded the top of the rock with.

Q. What do you mean by "we"? You say, We sounded on top.

A. John Hankins and Charles Pierson.

Q. That was on the 29th of November?

A. Yes, sir.

Q. Where was the vessel then?

A. The vessel was sunk about half way from here to the bridge, I should judge.

Q. The vessel was not there?

A. No, sir.

Q. How did you locate the probable position of the vessel in reference to that rock?

A. We had ranges when the vessel lay there to see where it came across the vessel.

Q. Well, I suppose you know how far the rock was from the outer edge of the wharf?

A. Yes; about 40 feet.

118 Q. 40 feet from the outer edge of the wharf to the inner edge of the rock?

A. I don't know it was the inner edge; it was the highest point. I could not tell exactly.

Q. How wide was the scow that was between you and the wharf?

A. 18 feet I think Mr. Speaker told me she was. I didn't measure the scow.

Q. How far was the schooner from the outer edge of the scow when she sunk?

A. She was about two feet forward and about six feet aft.

Q. Just in the same position she was on Saturday?

A. Yes, sir.

Q. That would be 20 feet forward?

A. Yes, sir.

Q. And how many feet aft; 24 feet aft?

A. Yes, sir; 24 feet from the wharf aft and say 18 feet from the wharf forward.

Q. How wide was the schooner?

A. 32 feet.

Q. What was the length of the schooner?

A. She was about 125 feet keel, and 138 feet the papers called for on the water line.

(By Mr. HAGNER:)

Q. Was the keel straight or how much of the keel was straight before she began to sheer?

A. The keel was supposed to be straight the whole length of her.

Q. How wide was the scow that was pointed out to you by the foreman and you intended to put in between the scow that was between the wharf and the schooner?

A. I don't know.

Q. About; you saw it, didn't you?

119 A. No, sir; I didn't look at it, that particular scow. He told me she lay just up above the other scows.

Q. You didn't look at it at all?

A. No, sir.

Q. These scows were all about the same size?

A. Yes, sir.

Q. Do you mean to say you didn't see the scow at all?

A. I didn't see the scow that day. If I seen the scow, I didn't know it. I probably seen every scow Mr. Smith had.

Q. Were they not all the same size?

A. I think Mr. Smith said there was two feet difference in width. I never measured any of them.

Q. If you had interposed the second scow between the first scow and the schooner, how far would it have thrown the schooner out?

A. If it was the same size as the other, it would be 36 feet.

Q. Far enough to clear the rock?

A. No, sir.

Q. Where would it have struck, according to your recollection, if you put that scow in, and that same rock was there, where would it have struck?

A. If the center of the rock was 40 feet from the dock and the rock was nearly 17 feet——

Q. Nearly 17 feet?

A. Yes, sir; by the hole in the vessel's bottom it is.

Q. I am not talking about the hole in the vessel's bottom.

A. That is the only way I can tell about the size of the rock.

Q. Didn't you say you could measure it?

A. As near as I could with the pole.

Q. Was it 17 feet?

A. I could not say. I think it was about 12 or 15 feet.

120 Q. In width or length?

A. In width. I didn't measure the length.

Q. If the two scows were 18 feet wide, each of them, that would be 36 feet, would it not?

A. Yes, sir.

Q. And the schooner was lying close up to the second scow—what would have been her proper position?

A. Right alongside the scow.

Q. That would be 36 feet?

A. Yes, sir.

Q. And you say your schooner is 35 feet?

A. 32 feet.

Q. And half is 16 feet?

A. Yes, sir.

Q. That would have brought the center of the schooner 52 feet away from the edge of the wharf under that calculation?

A. Yes, sir.

Q. And that would be 10 feet beyond the highest point of the rock, 45 feet, would it not?

A. Yes, sir.

Redirect examination.

By Mr. HAGNER:

Q. Since a hypothetical question has been put to you by Mr. Wilson, what would have happened if something had been done. I will ask you if that vessel had been put as Mr. Speaker had intended it to be on the following Monday morning, would it have rested on that rock or not?

121 Mr. WILSON: The question is objected to as imputing an intention to Mr. Speaker of which there is no evidence and as being wholly immaterial and incompetent and hypothetical.

A. Yes, sir.

JAN'Y 9TH, 1893—2 o'clock p. m.

Met pursuant to verbal notice to counsel for respondents.

Present: Mr. Nathaniel Wilson and Mr. Randall Hagner and the witness John Hankins.

And thereupon Mr. Hagner questioned the witness respecting his testimony given in this case as follows:

*Correction by Witness of His Testimony.*

Q. I find on page 21 of the typewritten testimony an apparent omission between the third and fourth lines in this question, and I therefore reask the question in the following form: Was the schooner Ellin Tobin, or was she not, when she left Fort Washington on the Potomac river for the port of Georgetown and up to the time immediately preceding her injury, staunch and suitable for the service for which you were engaged by Mr. Smith?

Mr. WILSON: That is objected to as leading.

A. She was.

Q. What was her condition in that respect up to that time?

A. Her condition was good.

Q. What was the condition of her planking and of her timbers?

A. They were sound.

122 The WITNESS: I would like to make a correction in the testimony I gave in regard to what Mr. Smith told me when I was in Mr. Lee's store and on the dock that I thought was in the testimony and is omitted.

After I had an introduction to Mr. Smith and he told me how much water there was—that there was 14 feet sure at low water—he told me he would like me to make some soundings around for myself, and he said he would have his men help my men shove off with a pole that he had on the lighter whenever we wanted to shove off, and he wanted me to sound on the inside, as some stone might have gotten off the lighter, and if we shoved her bilge off—her side, he called it—so we didn't hit the stones there was nothing to hurt us, and when he came on the dock that afternoon he told me the same thing.

*Cross-examination.*

By Mr. WILSON:

Q. Where was he standing?

A. He was standing right near the piling, the fourth piling, when he was standing talking to me below the stone-crusher.

Q. You forgot to state the other day what you now state what Mr. Smith said.

A. I thought it was in there, sir. I had not forgotten it.

Q. What do you mean by that—you thought it was in there? You thought you had said it?

A. Yes, sir; I did.

Q. When did you find out you did not?

A. When I read the testimony I found I said part of it. I got as

far as when the stone was knocked off the lighter and the rest was omitted.

Q. What time in the day was the conversation on the wharf?

A. Well, that was in the afternoon. I could not say what  
123 time.

Q. What day?

A. Friday.

Q. About what time?

A. It was along in the middle of the afternoon—past the middle of the afternoon—but could not say exactly. Towards in between the afternoon and night.

Q. Who was present?

A. Mr. Speaker was standing just below, towards the stone-crusher. I don't know whether he heard us or not.

Q. Nobody else?

A. There were some men working on the dock—colored hands—but I could not tell who they were.

Q. That was on Friday?

A. Yes, sir; when he was on the dock, and on Friday morning he told me the same thing. Friday, at about 11 o'clock, when I met him in Mr. Lee's store, he told me the same thing.

Q. Did you make any soundings when you were lying above the wharf before you took your position?

A. He told me there was plenty of water there.

Q. I wish you would answer my question. I didn't ask you that. I asked you as a matter of fact if you made any soundings.

A. No, sir.

Q. You could have made soundings, could you not?

A. When I first made fast to the dock, when I first came up, I could not.

Q. Why not?

A. Because there were three scows abreast there; that is  
124 the reason I could not get to the dock with the vessel.

Q. Could you just before you went to the dock?

A. Yes, sir.

Q. How long would it take to move the vessel away from the wharf to make the soundings?

A. I could not move the vessel away from the wharf to make the soundings.

Q. Why not?

A. I had nothing to breast her off with.

Q. Was there no pole there?

A. No, sir. There was a pole there 25 or 30 feet long, but that was not long enough.

Q. Did you ask for a longer pole?

A. No, sir.

Redirect:

Mr. Hagner, counsel for libellants, says that by an oversight he neglected to ask the Captain the following question, and therefore recalls him for that purpose:



Q. Captain, I neglected to ask you the other day whether you had ever been to that wharf and dock before.

A. I was never in Georgetown before in my life.

Q. I want to ask you whether or not the Ellen Tobin had ever been there before during the time you have been master of her.

A. No, sir; she has not.

No cross-examination.

JOHN HANKINS.

Subscribed and sworn to before me this 9th day of January, A. D. 1893.

RUTLEDGE WILLSON,  
*Special Commissioner.*

125 The taking of further testimony is here adjourned subject to notice, this cause having been referred to me by order made and entered herein on January 8, 1894, to take the testimony of libellants.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

DISTRICT OF COLUMBIA, ss :

I, Rutledge Willson, special commissioner, by virtue of and in pursuance of the stipulation made and entered into by and between counsel, as therein shown, of the parties to the suit in admiralty No. 379, now pending in the supreme court of the District of Columbia, in the district side thereof, in which Charles Burnett and others are libellants and Charles G. Smith *et al.* are respondents, which said stipulation is hereto attached and made part hereof, did on the 6th day of January, 1894, cause to be present at my office, No. 406 5th street N. W., in the city of Washington, D. C., John Hankins, the witness named in said stipulation, at the hour of 3 o'clock p. m. of said day, then and there present Randall Hagner, Esq., proctor for libellants, and Nathaniel Wilson, Esq., and Job Barnard, Esq., proctors for the respondents; and the said John Hankins, being by me first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in the aforesaid cause and being examined by the said respective counsel, did depose and say as set forth in said deposition hereto attached.

That questions and answers were taken down by my clerk in shorthand and on the 9th day of January, 1894, were read  
126 over by the witness, and, as therein afterwards set out, Randall Hagner, Esq., and Nathaniel Wilson, Esq., counsel as aforesaid, being present, the said witness made some corrections in his said testimony, as therein noted, and was then and there recalled and further examined and cross-examined by the said counsel, as is further set out in said deposition, and after the said depositions had been reduced to writing it was carefully read over to said witness by me and by him subscribed in my presence on the 9th day of January, 1894. I further certify that I am not of counsel for

either of the parties to this suit and am not interested in the event thereof.

Jan'y 9, 1894.

RUTLEDGE WILLSON,  
*Special Commissioner.*

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i> , Libellants,	}	Admiralty. No. 379.
<i>vs.</i>		
CHARLES G. SMITH <i>et al.</i> , Libellees.		

JANUARY 9TH, 1894.

To Messrs. Edwards and Barnard and Nathaniel Wilson, Esq.,  
counsel for libellees:

GENTLEMEN: Take notice that on Thursday, January 11th, 1894, at the hour of three o'clock p. m., at my office, No. 406 Fifth St. N. W., in the city of Washington, D. C., by virtue of an order made and entered in the above cause January 8th, 1894, I will proceed to take the depositions of witnesses produced on behalf of the libellants herein.

Very respectfully,

RUTLEDGE WILLSON,  
*Special Commissioner.*

127 Served copies Jan'y 9, 1894, on Edwards & Barnard by  
banding copy to Mr. Barnard, and on Mr. Wilson by leaving  
copy with his clerk in his office.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

WASHINGTON, D. C., *January 11th, 1894.*

Pursuant to the order made and entered in the above cause on January 8th, 1894, referring the same to Rutledge Willson, Esq., as special examiner to take the testimony of witnesses for libellants and in pursuance of the notice hereto attached to counsel for the respondents—

Met at the time and place mentioned in said notice, and the depositions of witnesses produced on behalf of libellants were taken as follows:

Present: Randall Hagner, Esq., counsel for libellants; Job Barnard, Esq., and Nathaniel Wilson, Esq., counsel for respondents; Charles G. Smith, Jr., one of the respondents.

And JOSEPH H. LEE, a witness produced on behalf of libellants, being first duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. Please state your name, age, residence, and occupation.

A. My name is Joseph H. Lee; I am 43 years of age; residence, West Washington, D. C.; occupation, ship-chandler.

Q. Ship-broker, too?

A. They have always gone by the name of ship-chandler. Ship-chandler and grocer the directory calls for.

128 Q. Mr. Lee, do you know Capt. John Hankins?

A. Yes, sir.

Q. When did you first know him, sir?

A. In August last, I think, is the first time I ever met him.

Q. Where?

A. At my store.

Q. Where?

A. In Georgetown.

Q. Well, now, what was the occasion on which you first saw him?

A. Well, on the first of August I engaged the schooner Ellen Tobin through him.

Q. Through him?

A. Yes, sir.

Q. To do what?

A. To load a cargo of stone for Charles G. Smith and Son for Fort Monroe, at 50c. per ton, loaded and discharged. The captain asked me about the water, and I told him they had loaded vessels there drawing fifteen feet of water, and recently had the dock dredged out to a supposed depth of 14 feet, though your vessel might ground at low water. On August 2nd the vessel towed up.

Q. Mr. Lee, how did you know the depth of the water?

A. Well, my information as to that came from a conversation that Mr. Smith and the contractor who dredged the dock had held in my office, at which Mr. Smith had said to the contractor that he wanted from 14 to 15 feet of water, and that is the last I knew of it.

Q. In regard to the Mr. Smith, identify which one it was.

A. Charles G. Smith, Jr. Then on August 3rd the captain 129 was in my office, and Mr. Smith came in there and I introduced him to Mr. Smith. I said, Captain, this is your shipper, and you will have to make your complaints to him. The captain said, How about the water there? Well, I presume I ought to have allowed Mr. Smith to answer the question, but I answered it for him, and I said, The dock had been dredged out, supposed to be 14 feet, though you might touch at low water. Mr. Smith said to him, I want you to make some soundings for yourself, and our superintendent will help you to place the vessel.

Q. Have you mentioned the superintendent's name?

A. No, sir.

Q. Who was the contractor who cleaned the dock out?

A. Mr. F. L. Somers.

Q. Where is he from?

A. Philadelphia, I think he is from.

Q. He was the man who did the dredging?

A. Yes, sir.

Q. How did you know at the time you represented to Capt. Hankins that there was a stone to be carried to Fort Monroe?

A. Because Mr. Smith notified me when they had stone to ship.

Q. He had notified you that the stone had to be shipped?

A. Yes, sir.

Q. Did he notify you how much he wanted carried to Norfolk?

A. I don't recollect as to that. It usually happened that they

would receive orders to ship until further notice or to ship so many tons for the month, and I don't recollect which circumstance this was, whether it was a limited amount or——

Q. Were you employed generally or not to ship all of Mr. Smith's stone or find carriage for all the stone?

A. No; I don't know you could call it employed. They notified me they had stone to go.

130 Q. Was there any other broker in Georgetown who took any of these orders for vessels to ship stone?

A. I think not in Georgetown. They had some dealings with a broker in Baltimore.

Q. Did you attend to all in Georgetown?

A. No; not all.

Q. Who else attended to any?

A. They occasionally took a vessel themselves.

Q. But if there was any broker employed or any one employed as broker by Mr. Smith to get vessels, you were the one, is that the idea—that is, in Georgetown?

Mr. WILSON: I object to that as leading and incompetent.

A. In Georgetown?

Q. Yes; In Georgetown.

A. Not necessarily; they were not obliged to employ me.

Q. I want to know the custom.

Mr. WILSON: I object to any evidence about what the custom was.

A. The custom as to whether——

Q. As between you and Mr. Smith?

A. The custom was this: when they had stone to go they usually told me they had stone to go to Fort Monroe, and if I secured a vessel it was all right, and if they secured a vessel why they had the right to do so.

Q. How long had they been shipping stone to Fort Monroe?

A. I don't remember exactly; about a year, perhaps, more or less; in the neighborhood of a year.

131 Q. Was it the same morning, Mr. Lee, that you introduced Capt. Hankins to Mr. Smith? That was the first morning you ever saw the captain?

A. That was. It was the first morning.

Q. Was that the first morning you ever saw the captain?

A. No, sir.

Q. You had seen him how many mornings before?

A. I don't remember as to that. He had been coming in there several times.

Q. As I understood you, it was before you introduced Mr. Smith to the captain and the captain to Mr. Smith that the captain asked about the water, the depth of it?

A. Yes, sir; he asked me before and at the time I introduced them both.

Q. How often was the captain in your office before you introduced him to Mr. Smith?

A. I could not tell you about that.

Q. Try and remember, please.

A. I have no recollection as to the number of times he was there.

Q. Was the captain in there more than once during any one day before the day you introduced him to Mr. Smith?

A. I could not tell about that.

Q. You don't remember that?

A. No, sir; I don't recollect about that.

Q. Are you perfectly certain, Mr. Lee, that you had not seen the captain before August 1st?

A. I am wrong about that. I did see him before August 1st. I fixed that date as the time I hired the vessel.

Q. Had the captain or not come up to see you several times before introducing him to Mr. Smith?

132 A. Yes, sir.

Q. You said back there, Mr. Lee, that it was to be 50c. a ton, loaded and discharged. Who were to load and who were to discharge the stone?

A. The shipper loaded it and the Government discharged it.

Q. What was the name of the superintendent of the wharf, Mr. Lee?

A. Mr. Speaker.

Q. Do you know his first name?

A. William.

Q. Mr. Lee, do you remember hearing Mr. Smith say to the captain that he would find a pole down there at the — that he could breast her off with?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. Do you remember on the days before you introduced the captain to Mr. Smith—the days that he came in your place—that he inquired about the depth of the water?

A. No, sir; I don't remember any particular day.

Q. Do you remember that he had before that or not? What is your recollection about it?

A. I don't remember.

Q. What I want to know is, did the captain inquire about the water on any day before the day that you introduced Mr. Smith to the captain?

A. I am not certain about that, but I think he spoke about the water before that.

Cross-examination.

By Mr. BARNARD:

Q. If he spoke about the water before that when was it and what did he say?

133 A. What did the captain say?

Q. Yes.

A. He asked as to the depth of the water at the wharf.

Q. When did he make that inquiry?

A. If it was made it was about the 1st of August, when we engaged him.

Q. Do you recollect it sufficiently clear in your own mind now to say whether it was made or not; and, if so, what was your reply to it?

A. I am not positive as to whether he did ask me. If he did I made the same reply that I did when I introduced him to Mr. Smith.

Q. Did he say anything about what the depth of water was the Ellen Tobin drew?

A. I don't think he told me what she drew.

Q. How did you ascertain what she drew, if you did find it out?

A. Well, we usually know a vessel's draught; we are familiar with it. We are familiar with the draught of water.

Q. How much did she draw?

A. They always considered her a 14-foot vessel—what we call a 14-foot vessel—and I don't remember whether I got that information from the captain or whether it was my own knowledge of the vessel.

Q. How long have you been acquainted with the Ellen Tobin?

A. I have known of her ever since I have been in the business—fifteen years.

Q. Has she been at Georgetown before? Has she ever been there before?

A. Yes, sir; she has been to Georgetown before.

Q. Do you know how recently?

A. No.

Q. Where did you first make her acquaintance?

A. I don't think I ever had any business with the vessel before this time.

134 Q. Where did you see her?

A. I don't think I ever saw her before.

Q. Well, how did you know her, then?

A. From the registry and from the report we have—the Government registry.

Q. At your office?

A. Yes, sir.

Q. She has been plying at this port for a great many years, running up and down the river?

A. My recollection of it is that she traded here regularly before I came in business, but not much since.

Q. Mr. Lee, you spoke of a conversation between the contractor who did the dredging and Mr. Smith, in your office sometime. When was that conversation held, as near as you can fix it?

A. That was just before they dredged the wharf out, and, I think, the wharf was dredged in April.

Q. Of what year?

A. 1893.

Q. Will you state as near as you can what Mr. Smith said in that conversation in reference to the water?

A. He said they would need about 14 or 15 feet of water.

Q. You heard Mr. Smith say they would need 14 or 15 feet of water?

A. Yes, sir.

Q. Is that all the knowledge you had as to the actual depth of the water there at the time you answered Capt. Hankins when you introduced him to Mr. Smith?

A. Yes, sir.

Q. You never knew actually how deep the water was after the dredging?

A. No, sir.

135 Q. How came you to say to Capt. Hankins that his vessel might ground a little in low water?

A. I thought it possible that they might not have dug to the even depth of 14 feet all over.

Q. Do you know anything of your own knowledge as to the depth of the water there now?

A. No, sir.

Q. You never made any soundings yourself?

A. No, sir.

Q. Do you know of any vessels as large or larger than the Ellen Tobin loading at this wharf of Mr. Smith's?

A. Yes, sir.

Q. What vessels?

A. The schooner "A. De Nike" loaded there.

Q. What did she draw?

A. About 15 feet.

Q. Do you know how they loaded her, whether with a chute or with wheelbarrows?

A. Both, I think.

Q. How near the wharf was she laying?

A. I don't know.

Q. I mean by that whether they put in more than one lighter between her and the wharf?

A. They put in two when they finished her.

Q. You never have made any charter-parties, have you, for Mr. Smith; signed any formal contracts?

A. I never signed any contracts for him.

Q. And Mr. Smith has never employed you as a broker or paid you compensation for anything?

A. No, sir.

136 Q. You get compensation for them, do you not?

A. Yes; occasionally; sometimes I have.

Q. Who has paid you when you get compensation?

A. The vessels.

Q. And the vessels have really engaged you to find freight for them; that is the amount of it?

A. Yes, sir.

Q. And Mr. Smith came to you as knowing of some, or having, vessels that wanted freight to haul?

A. Freight for vessels; yes, sir.



Q. Mr. Lee, you generally see these vessels, I suppose, there at this wharf loading, from your place of business?

A. I could see them; yes, sir.

Q. What do you know in reference to the conduct of the vessels and their control, as a matter of fact, while loading there; who has control of the vessels?

Mr. HAGNER: I object to that.

A. I don't know anything about it.

Q. You don't know whether the captain of the vessel controls the location of the boat while she is loading or not?

A. No, sir; after my introduction of the captain to Mr. Smith I don't know a thing about it.

Q. You don't know what arrangement was made between them, or do you?

A. No, sir.

Q. In this instance did you receive any compensation from the captain?

A. No, sir.

Q. Or any promise to pay?

A. No, sir.

137 Q. Did he apply to you for freight, and in that way you introduced him to Mr. Smith?

A. Yes, sir.

Q. Did you ever know of any rock being in the river at the point where this vessel lay?

A. No, sir.

Q. Did you ever hear of any?

A. No, sir.

Q. Never heard of any instance of this kind happen before?

A. No, sir.

Q. You have been there in business for 15 years?

A. A little over 15 years.

Q. Did you learn from Mr. Smith or from any one else that they were in want of a vessel of 600 tons burthen before you spoke to them about the Ellen Tobin?

A. I knew they wanted vessels. I was not limited as to size.

Q. After the captain spoke to you about the freight, and you knew that the Smiths wanted a vessel to carry stone, did you see Mr. Smith in relation to this contract before the day you introduced the captain to him?

A. Yes, sir.

Q. Did you make the arrangements for the vessel to come there with Mr. Smith yourself, or did you send Capt. Hankins to him?

A. No, sir; Captain Hankins was not sent to him.

Q. And when you introduced Capt. Hankins to Mr. Smith it was some little time then after the contract had been actually made through you?

A. Yes, sir.

Q. And the vessel was then being loaded, was it not?

A. It was between 9 and 10 o'clock in the morning that I introduced him.

138 Q. Of what day?

A. The third; the day they commenced loading.

Q. The day they commenced loading was the 3rd?

A. Yes, sir.

Q. Do you remember the day of the week?

A. August the 3rd.

Mr. HAGNER: Was that memorandum made at the time these things happened or how long subsequent (the witness having a paper in his hand for the purpose of refreshing his memory)?

A. Just about the time the vessel sank.

Q. Mr. Lee, do you remember the day of the week that the vessel came up there to the wharf?

A. I have got that down, but I don't remember it. The vessel came down on the 2nd. I put it down on the memorandum.

Q. And you think it was the 3rd that you had this conversation with Mr. Smith?

A. I am satisfied it was the next morning.

Q. You don't know whether it was Friday or not?

A. I don't know the day of the week.

Q. In that conversation did you hear Mr. Smith say anything about the depth of the water?

A. No.

Q. You did hear the conversation about the soundings? He asked the captain to sound for himself.

A. Yes, sir.

Q. Do you know any other large vessel loading there previous to the Ellen Tobin loading except the "A. De Nike"? If so, state what it was.

A. The "Mattie B. Russell." She drew about 15 feet.

Q. Any other?

139 A. "Sunlight;" she drew about the same. Any of these vessels may draw six inches less than that.

Q. Do you think of any other?

A. I don't think of any other of that draught.

Q. You never heard of those vessels having any trouble there in loading?

A. No, sir.

Redirect examination.

By Mr. HAGNER:

Q. If you have no objection, Mr. Lee, and as it would be a shorter process, I would like you to say from what you remember everything that occurred and how it occurred when you were there in your office with Captain Hankins and Mr. Smith the day you speak of.

A. I introduced Captain Hankins to Mr. Smith.

Q. Was there anything before that at all?

A. No, sir; I said to the captain, This is your shipper.

Q. Had the captain asked any questions just before that?

A. No, sir. (Witness continuing last answer :) To him you will

make your complaints. The captain replied, I don't think I will have any to make. He then asked as to the water.

Q. The captain did?

A. Yes, sir; and I replied, The dock had recently been dredged out, supposed to — 14 feet at low water, though your vessel might ground at low tide.

Q. Did you then say, but nothing to hurt? Do you remember that expression?

A. I don't remember that. Then Mr. Smith and Captain Hankins had a conversation, but I paid no attention to it, about loading.

Q. Then you did not interest yourself any more about it?

A. No, sir.

140 Q. Did you or not then attend to something else?

A. I then went away to my desk at work, and I left them in conversation. I don't know how long the conversation lasted or what was said at the conversation.

Q. Did you hear Mr. Smith say to the captain that the berth was dredged out on the April before?

A. No.

Q. Is it not a universal custom, if you know, for all brokers to be paid their commission by the vessel?

A. Well, I don't know about that.

Q. Don't you know about it? Haven't you been pretty well versed about that sort of thing?

A. I could not say as to what the custom of other places is.

Q. You don't know the brokers' customs in that respect, do you?

A. I do not.

Q. You only know the custom that existed there with you?

A. I only know the custom with me.

Q. Have you always charged the vessel?

A. Yes, sir.

Q. How far off is your place of business—your store—from Mr. Smith's stone-crusher?

A. Between two and three hundred feet, I should judge.

Q. The properties adjoin, do they not?

A. No, sir.

Q. Something intervenes?

A. Yes, sir.

Q. What is it?

A. One warehouse.

141 Q. One warehouse intervenes between your warehouse and Mr. Smith's stone-crusher property?

A. Three or four warehouses between.

Q. Between you and the office?

A. Yes, sir.

JOSEPH H. LEE.

Subscribed and sworn to before me this 16th day of January,  
A. D. 1894.

RUTLEDGE WILLSON,  
*Special Commissioner.*

At the same time and place and in the presence of the same parties also appeared CHARLES J. PIERSON, a witness produced on behalf of the libellants, —, being duly sworn, testified as follows :

By Mr. HAGNER :

Q. Please state your age.

A. 29 years of age.

Q. Where do you reside ?

A. In Baltimore, Md.

Q. What is your occupation, Mr. Pierson ?

A. Submarine diver.

Q. How long have you been engaged in that work ?

A. Between six and eight years.

Q. Where were you the day before last Thanksgiving day ?

A. I was in Georgetown.

Q. At what place in Georgetown, sir ?

A. At Mr. Smith's stone-crusher—stone works.

Q. Had you previous to that time ever seen the Ellen Tobin ?

A. Yes, sir.

142 Q. When was that ?

A. I worked on her nine days.

Q. Before that ?

A. Yes, sir.

Q. What doing ?

A. Doing submarine work ; pumping stone out of the hold.

Q. Where were you ?

A. It was diver's work to lead the pipe up to the stone.

Q. When you were aboard of the Ellen Tobin, where was she lying ?

A. She was sunk. She was opposite the stone ; opposite the stone-crusher.

Q. Just state what you did there on that dock on the day before Thanksgiving.

A. Well, sir, I went down and examined the stone.

Q. Went down where ?

A. I went down off a lighter. I went down on a ladder attached to a lighter, and I found the stone about eight feet from the ladder ; six or eight feet.

Q. How was the ladder fastened to the lighter ?

A. The ladder was lashed to a stanchion on the stone lighter.

Q. Where did you find the rock ?

A. About six or eight feet from the ladder.

Q. From the upper part of the ladder or from the foot of the ladder ?

A. After I got on the bottom.

Q. Describe the rock.

A. I found a rock ; of course I cannot swear to inches, but I can swear to feet—that is, I know my own measurements. After stretching my arms I know I can stretch five feet, and I found a rock that

143 was six of them lengths, which would make 30 feet long, and between five and six feet high, and between eight and ten feet on the top of the rock.

Q. What was that (handing witness paper)?

A. That is the stone as I marked it off after I came out of the diving suit.

Q. You were down there in a diving suit, were you?

A. Yes, sir.

Q. Did you write your name there? Is that your writing (indicating)?

A. Yes, sir; Charles Pierson, and my address, 3141 Dillon St.

Q. And that is your drawing?

A. Representing a rock, yes, sir; as near as I could get it.

Mr. HAGNER: I desire to introduce this in evidence, to be marked Libellants' Exhibit No. 5, Pierson.

(Here follows exhibit marked p. 144.)

145 Mr. WILLSON: I object to the introduction of this exhibit as incompetent.

Q. What is the general shape of that rock, Mr. Pierson, on the top or bottom or any way you choose to shape it?

A. It is shaped something on the order of a half moon. Something on a circle.

Q. Won't you say what this is, please (handing witness a board on which there appears a raised substance representing some object)?

Mr. WILSON: I object to the question and answer, as no proper foundation has been laid.

Q. What is this thing I just handed you?

Mr. WILSON: I object to the question as immaterial.

Q. Who made this?

A. I made this.

Q. What is it?

A. It is a sort of location of the rock. This is supposed to be the wharf (indicating) and this is the scow, and this is supposed to be a diagram of the rock, supposed to be about five or six feet high; thirty feet this way (indicating the length).

Q. Have you marked on that the wharf, the lighter, and the river bottom?

A. Yes, sir; I have.

Mr. HAGNER: Now, I propose to introduce his model in evidence, to be marked Libellants' Exhibit No. 6, Pierson.

Mr. WILSON: I object to the question and answer as immaterial and improper, and I object to the introduction of the so-called model.

146 Q. Is that made on a scale at all?

A. No, sir; I don't understand the scale business.



A. It is only intended as a representation of the shape of the rock?

A. Yes, sir.

Q. You didn't intend to have things in proportion there at all?

A. No, sir; I measured in case I was asked any of the lengths, what is it I mean by thirty feet, what do I mean by eight or ten feet, and what I mean by five or six feet.

Q. Do you know Capt. Hankins, Mr. Pierson?

A. Yes, sir.

Q. Where was he?

A. He was on the scow or the lighter a little before I went to the bottom. I went and examined the rock and came up, and on the second visit to the rock he said he would lower me a pole.

Mr. WILSON: I object to all this, as to what the captain said, as hearsay.

Q. He was to lower you a pole, was he?

A. Yes, sir; he told me to place it on the highest point of the rock.

Mr. WILSON: I object to any conversation or instructions received from the captain.

Q. And place it on the highest point of the rock?

A. Yes, sir; I held it there for two or three minutes.

Q. Can you tell us what part of the rock was farthest from the wharf; was it the highest or lowest?

A. The highest part.

147 Q. The highest part was furthest from the wharf?

A. The highest part. There is not much difference, but the highest part is furthest from the wharf.

Q. Did you find anything there at the bottom besides rock?

A. Well, when I got on the extreme end of the rock—

Q. Which way?

A. Towards the offshore, the outer end of the rock, I found three or four old logs. I didn't pay much attention to them because I was sent to examine the rock and not the loose matters.

Q. Were these logs fastened or simply loose?

A. They were loose logs. In fact, I paid little attention to them. I simply put my hands on them and knew them were logs. I didn't think they were of much consequence.

Q. About what is the distance across the rock, Mr. Pierson, straight out from the wharf?

A. Across from this corner (indicating)?

Q. Yes, sir.

A. I judge it would be between—I never measured, crawled. What I mean by that is I never went over it to give a description by. I crawled over 15 or 18 feet.

Q. Did you try to measure it the way you did the length of it?

A. No, sir; only crawling over it.

Q. Do you think you could approximate it?

A. Yes, sir.



Q. Let me ask you how wide the rock would be from the bottom of the ladder where you went down to the bottom across to the other side of it from bottom to bottom?

A. From the end of the ladder?

Q. From the nearest point of the rock to the bottom of the ladder, across?

148 A. I judge it would be 24 or 26 feet.

Q. You described how long it was?

A. Thirty feet.

Q. How far is it from the wharf to the bottom of the rock on a straight line from the wharf; how far would you say, if you remember?

A. Well, I cannot answer from the wharf. My attention was—I can answer from the ladder to the rock and across the rock.

Q. Did you notice any peculiarity about the top of the rock?

A. No, sir; it shapes something on that order, with a comb to it; it comes down in that shape (indicating).

Q. Were there any indentations on the rock at all; any cuts in it?

A. There was one impression there; it looked to me as if it was the keel of a boat that lodged on it and broke that off; it was a hole something on a V-shape; it was a hole about two feet by eighteen inches deep.

Q. Two feet long by 18 inches deep?

A. Yes, sir; on a V-shape. It came down——

Q. How wide at the widest point?

A. About two feet.

Q. Would you show it to us on the model?

A. I cut this out for it.

Q. What do you get per day as a diver while you are working?

A. We are paid by the hour—that is, our divers—and get a dollar an hour.

Q. Do you know what your employer charges per diem?

A. I don't know exactly, but I heard—that is, on a job that lasts a week or over, \$35 and expenses for freight.

Q. \$35 a week or day?

A. \$35 a day and expenses.

149 Cross-examination.

By Mr. WILSON:

Q. How long have you been engaged in business as a diver?

A. Between six and eight years.

Q. Where; in Baltimore?

A. Yes, sir; for Louis E. Broome.

Q. When did you first see the Ellen Tobin in Georgetown?

A. Well, I don't remember the date, but my boss gave me orders; in fact, he met me in the morning, and he said he was coming over to Georgetown to do this work, and he asked me to come with him to help him out on it; it was too hard to do it himself. Divers generally work half a day apiece. They generally have two divers

on any kind of a job over a day; generally have two divers, one to work in the morning and the other in the evening.

Q. What was the first work you did on the vessel?

A. On the Ellen Tobin?

Q. On the Ellen Tobin.

A. The first work was to get the diving apparatus in order and go to work.

Q. When was that completed, ready to go to work?

A. I don't remember the date, but it was on Thursday, about 11 o'clock in the morning.

Q. What month?

A. I disremember the month.

Q. What year?

A. 1893.

Q. Where was the diving apparatus placed?

150 A. It was placed aft of the main hatch.

Q. On the Tobin?

A. The Tobin; yes, sir.

Q. Was the deck above water or below?

A. Well, at times the water was over the deck; that is a couple of inches; that is on the port side.

Q. At high tide?

A. I suppose that was high tide. At other times the water was off the deck.

Q. At any rate, you could get on the deck in order to put the apparatus there?

A. Yes, sir.

Q. Did you do that?

A. Yes, sir.

Q. I wish you would describe the situation of the Ellen Tobin at that time in reference to the wharf.

A. I don't quite understand you.

Q. Did she lie parallel with the wharf?

A. Well, if you mean running the same as the wharf.

Q. The same direction?

A. She did.

Q. How far from the wharf?

A. Well, I didn't pay any particular notice to that. I noticed there was a lighter in between her and the wharf.

Q. Was she pretty close to the lighter?

A. Well, there was room—I have seen them take scows in and out; I never paid strict attention. In my opinion there was two or three feet difference.

Q. You mean to say there was two or three feet space between the lighter and the schooner?

151 A. And the schooner; yes, sir. There might have been more and there might have been less.

Q. Was the lighter right in front of the wharf?

A. Yes, sir.

Q. Was the wharf wider than the lighter—did the wharf extend beyond the lighter, up and down the river?

A. Yes, sir.

Q. How long was the lighter?

A. I don't know, sir. I judge it would be—well, on a rough guess, I judge it would be 40 to 60, 40 to 50 feet.

Q. And how wide?

A. I judge them scows to be 20 feet—something like that; 18 or 20 feet.

Q. When you got your diving apparatus on the deck of the schooner, what did you do next?

A. Well, it was 11 o'clock—

Q. At night?

A. In the morning; and the boss told us we would not make a start until after dinner, so we knocked around till after one o'clock, and the boss got ready to work that afternoon.

Q. Who was the boss?

A. Louis E. Broome.

Q. How did you work and what did you do?

A. I pumped the air pump.

Q. You didn't go down first.

A. No, sir.

Q. Who went down first?

A. Mr. Broome.

Q. When did you go down?

A. I went down Friday afternoon.

152 Q. Where did you go down—inside the vessel?

A. Inside the vessel.

Q. Didn't go outside?

A. No, sir; I didn't go outside.

Q. Didn't go down or make any examination to see what the outside was?

A. No, sir.

Q. Or what the obstruction was?

A. No, sir.

Q. Was any examination made by any one while you were there by going outside the vessel?

A. Not in a marine suit; no, sir.

Q. What did you go down in the vessel for?

A. To lead the pipe up to the rock.

Q. What kind of a pipe was it?

A. It was an 8-inch suction pipe and required a diver to lead it up to the rock to suck it into it and pump it out on the scow.

Q. And when that work was begun you don't know?

A. The diving—no, sir.

Q. How long did it continue?

A. I made eight days and a half.

Q. Did you pump out all the stone?

A. As much as we could.

Q. How much did you pump out?

A. I don't know, sir; but we was to pump the stone out so that after she was raised—after it was scattered over the bottom it would not make six inches.

153 Q. The stone that came out was put on the scow and carried away?

A. Yes, sir; I saw it carried away around the stern of the vessel and landed on the wharf.

Q. When did you stop working; do you remember the day you stopped working?

A. I stopped work Tuesday at 2 o'clock.

Q. You got out all the stone you could get out?

A. Yes, sir.

Q. You were a week in unloading her—getting the stone out?

A. Longer. We came on Thursday and got away on Tuesday of the second week after.

Q. What was done to the vessel then, after you got the stone out?

A. I paid no more attention to her.

Q. You came away?

A. Yes, sir.

Q. Did you ever see the vessel afloat?

A. No, sir; I never seen her since.

Q. When you saw her last was she lying there?

A. She was lying there in that position.

Q. When was it you returned to make the examination of this rock?

A. On the 29th of November.

Q. How long was that after you discharged the stone?

A. In the neighborhood of a month.

Q. Nearly a month?

A. Yes, sir; I remember now the month, of course; it was October, around about the 12th or 13th; around there.

Q. It was the 12th or 13th of October you began work?

154 A. Yes, sir; it might be a little less. I remember my birthday being while I was over there, the 19th of October.

Q. When you went down in the vessel could you tell anything about the condition of her bottom?

A. Yes, sir; it was humped up about the same as it was on deck, but we was engaged to pump the rock out and not to look after the schooner and not to pay attention to it.

Q. When the stone was out could you tell pretty well what her condition was?

A. No, sir; we saw it was about the same condition as the deck was, but I heard from the other diver that her keel was broke, but so far as I know I don't know. It was only hearsay. I never went to examine, and, of course, by finishing the aft-hatch first and moving forward we were away from the break, and the break was nearest the aft-hatch.

Q. The break was nearest the aft-hatch?

A. Yes, sir.

Q. Could you tell where this hump was in reference to the scow, what part of the scow the hump was opposite?

A. What part of the scow?

Q. That lay next to the wharf?

A. No, sir.

Mr. HAGNER: I object to that question, as it has already been testified that the scow was moved backwards and forwards.

Q. You could not tell?

A. At one place I think the scow had been moved one way or the other.

Q. Could you tell anything about this vessel in reference to the wharf itself?

155 A. It lay the same as the schooner lay; just the same way; what I would call east and west, running.

Q. Can you state and mark on that piece of sculpture where the vessel was and on what part of the rock her bottom rested?

A. No, sir; I cannot. To the best of my knowledge the schooner was on the rock, but where I could not tell.

Q. You cannot tell anything about her position in reference to the rock?

A. No, sir. This highest peak here was, to my opinion, where the highest break was on her deck. It corresponded with where the highest break was to come down on the rock.

Q. How far was it from the point of the rock that was farthest away from the scow or the wharf—to the wharf, I mean, across here (indicating)—how far was this point from the scow?

A. I don't know. I could not answer that. I could not answer that without guessing at it.

Q. State your best recollection. You measured it at one time.

A. No, sir; I never measured from the wharf to the end of the rock.

Q. Did you ever measure from the end of the rock to the point near the scow?

A. No, sir.

Q. How far was it?

A. I came down the ladder that was made fast to a stanchion on this scow, and after I got off the ladder—we generally take a lead-line, because after we start the mud up we cannot find the ladder—after having a lead-line to the ladder I got ready to go, made two steps, and threw my hands in front of me and found a rock; I judge it was six or eight feet from the ladder.

156 Q. And the rock was six or eight feet from the scow—the part of the rock closest the scow?

A. Yes, sir.

Q. In this model the scow is not put flush with the wharf. How did it lie there? There is a little space there. What is that there (indicating)?

A. I don't understand about that.

Q. I mean to say when you saw the scow, was she close to the wharf or not?

A. I didn't pay any attention to that. I slided our air machine, slided it down. We had a scantling or joist to slide it down on the scow. How much difference between the scow and the wharf I never took notice.

Q. Did you measure the depth of the water from any part or points on the top of the rock to the surface; and, if so, where?

A. I was told by the captain that he would hand me down a pole or strip and have me to place it on the highest point of the rock, which I did, and held it there until he was through with it; till he pulled the pole out of my hand.

Q. What was that distance?

A. I don't know.

Q. Did you ever see the stick they exhibited in here the other day? Did you make a mark on it?

A. No, sir; I had nothing to do with it.

Q. Well, you measured from that highest point. That highest point was there (indicating)?

A. No, sir; the highest point was here, but it has fagged down a little. The model has grown smaller.

157 Q. Mark on there with pencil what you intended to be the highest point, where you put the stick.

A. (Witness, indicating a point on the model, marks on Exhibit No. 6 with pencil the highest point of the rock.) There is not much difference between it. It is much of a level, and it has this break on it which interferes with its being smooth all the way across, but I thought that that point was the highest, and that is the reason I done as he told me.

Q. How far was it from the scow to that highest point—from the outer edge of the scow to that highest point?

A. I don't know that.

Q. You didn't measure that?

A. No, sir; I didn't measure that. I was told to get the width—the width and breadth.

Q. Where did you measure for the width?

A. This here, sir (indicating).

Q. Where do you mean, from there to there (indicating)?

A. No, sir; from this here to this comb.

Q. That was the width?

A. Yes, sir.

Q. I suppose that is the east end of the rock?

A. Yes, sir.

Q. From the east end of the rock to the comb, how far was it?

A. I judge it to be eight or ten feet.

Q. Did you measure it?

A. In my way. I measured the rock back. After I got away from this comb, say, about two feet, the bottom was covered with this substance—this dust—and I followed the rock back until I got about here (indicating), as I judged far enough, and I was

158 satisfied it was one solid rock. I got far enough and I stopped, and I lay on my belly and I put my feet in this place, where I stopped and stretched my arms out intending to reach the comb, but it was two or three feet out of my reach. That is the reason I say it was between eight and ten feet. The rock was longer, but this, I thought, was far enough to measure.

Q. You are not eight feet high.

A. I lay down and reached my hands down. I am five feet eight, I believe.

Q. How far was it from the comb you speak of to the west end of the rock?

A. I never measured that.

Q. You have no idea?

A. No, sir; I started from this corner and followed the rock to this corner and measured that (indicating).

Q. How far was that?

A. 30 feet.

Q. 30 feet?

A. 30 feet and over.

Q. And how far was it from the outer edge of the rock?

A. I never measured that at all.

Q. You never measured it across at the widest part?

A. I never took that way of measuring, but by crawling over from that point. I was asked to judge how many feet it was from that point to that (indicating), and it was between 15 and 18 feet, I judge.

Q. Did you go around the outside of the rock at all?

A. Yes, sir; I followed it around to see if it was all rock.

Q. All the way around?

A. Not back here; no, sir. As I said before, this bottom comes up to about here on the rock (indicating), so about three feet  
159 of the rock is bare, but the others you have to dig through to the rock to get to the bottom two or three inches.

Q. Was the bottom smooth between the scow and the wharf—the bottom of the river?

A. I never examined, only from the lighter to the rock.

Q. A short distance?

A. A short distance, six or eight feet.

Q. Six or eight feet?

A. Yes, sir.

Q. How was that?

A. That was about the same as an ordinary bottom.

Q. Muddy; soft?

A. Yes, sir; of a soft nature; yes, sir; but on the back of the rock it was hard and firm. It was hard and firm on the back of the rock.

Q. Where you went into the water to the highest point of the rock opposite, how far was it—from the scow to the highest point of the rock opposite where you went into the water, how high was the rock in reference to the bottom?

A. The rock you mean—the highest point coming across from the ladder across here (indicating)?

Q. Yes.

A. I guess you would find it about here, which was about three or four feet high.

Q. Three or four feet there?

A. Yes, sir.

Q. Did it rise abruptly, as it is described here, from the bottom?



A. Yes, sir; and here it was almost sheer down; straight down (indicating). It is not straight up the rock. The rock is on a slanting position.

160 Q. In reference to the wharf and in reference to this rock, cannot you tell us how the vessel lay and where her forward hatch was and where her aft hatch was?

A. From the wharf?

Q. Take this (indicating) to be the wharf and this the rock.

A. I didn't *not* notice how the wharf was. The wharf was disinterested to me. I noticed the schooner was under a chute—that is, at her forward hatch. It looked to me as if they had been working out of the chute when the vessel went down.

Q. I am not asking you about that. That would make her forward hatch where?

A. Her forward hatch would be here (indicating).

Q. Opposite this wharf here?

A. If you got to this wharf, it would be off here somewhere (indicating), but the spout was up opposite the main hatch. How many feet it was, I don't know in feet. I judge something like that.

Q. The spout was?

A. Forward of the main hatch.

Q. Forward of the break; the highest break?

A. I noticed that the spout, you know—it looked to me as if they had been loading it, because there was rock on the deck at the time, and I understood they had been working in that hatch. The last rock that was put in her came out of that spout from the forward hatch.

Q. You went pretty much over the rock, did you?

A. Yes, sir.

Q. Was it all bare?

A. No, sir.

161 Q. What part of it was bare and what part covered?

A. The east part was covered, say, three or four feet from the comb.

Q. All the way down to the bottom?

A. On the level. You come here, here was one bottom; you come up here to three or four feet of the combing and the bottom fell down four feet, I judge, three or four feet to the bottom. You walk off on hard bottom down to a soft bottom.

MR. HAGNER: That is coming from the east?

THE WITNESS: That is coming from the east.

Q. What was on top? Perfectly bare on top?

A. There was about three feet of it from the comb bare. I could put my hand on it and see it was rock. I had to brush away the bottom. There was an inch or two, maybe three inches, of this substance, this hard dust, before you get to it. I followed it back till I thought it was sufficient for me to say it was the natural rock and stopped and measured the distance from there to the combing.

Q. How much of this surface was bare?

A. I judge between three and four feet.

Q. Square, do you mean?

A. No, sir; it was from the combing here coming east; and the rest of it was all covered with stone dirt?

Q. Stone dust?

A. The highest peak was not covered at all.

Q. And about how many feet did you state was not covered?

A. It was all covered until you come to within three or four feet of this combing, and then you went down a hole.

Q. How much of that combing was there that was not covered?

A. I say between three and four feet.

162 Q. I mean high.

A. 14 or 16 inches of solid rock that was not covered.

Q. You have marked there the highest point of it?

A. Marked there?

Q. Yes. Haven't you?

A. Yes, sir; to the best of my ability.

Q. How was that? Was that covered or not?

A. No, sir; it was not covered.

Q. No dirt around there?

A. No, sir.

Q. There is considerable space around there that seems to be about the same height?

A. Yes, sir; combing. After you get about six feet from the end here is very near about dead level till you come to this break (indicating), and I was asked to put it on the highest peak, and where I put this pole I thought it was the highest peak.

Q. You speak of the combing around there. Was there any difference in the height of the combing very near level?

A. Yes, sir.

Q. For what distance?

A. About 12 feet of it was pretty near level. Of course, as near as a diver can — After he goes down he disturbs the water.

Mr. HAGNER: The water get- muddy?

A. The water gets muddy.

Q. You were down in the vessel frequently?

A. Yes, sir.

Q. And you saw the position of the vessel in reference to the wharf?

A. Yes, sir.

163 Q. And you saw the hump on the vessel, on the deck and down below?

A. Yes, sir—that is, I felt it down below and saw it on deck.

Q. Can't you state the position of that hump in reference to that rock?

A. I don't quite understand the question. The hump, if that is what you are alluding to, I paid very little attention to that hump, but, as near as I could judge, it was around the mast, I think what they call the mainmast; the middle mast, anyhow.

Q. As you saw the vessel lying there, how far would the bow of the vessel be from the highest point you marked on that rock?

A. That is the stem of the boat to the highest point of the rock.

Well, that is all guess-work ; that is only guessing the difference between the rock and the stem.

Q. You see the vessel there, in reference to the wharf, and you saw that point, and I ask you to state, if you can, how the vessel lay on the rock. If you don't know, I don't know who does know.

A. No, sir ; I don't know anything about how the vessel lay on the rock.

Q. You cannot tell anything about that ?

A. No, sir.

Q. I would like to have you state again how far the highest point of the rock was from the outside of the scow.

A. I cannot quite answer that. I can answer how far it was from here (indicating) to the highest point of the rock (indicating).

Q. You say it was between six and eight feet from the edge of the scow to the point of the rock closest the scow ; now I ask you what was the distance from the outer edge of the scow to the highest point of the rock marked there to the place where you  
164 marked it on the model and where you say you measured it or put down the stick.

A. My judgment ?

Q. Yes.

A. I didn't measure it, of course ; that is guess-work for me. My work was to find out how high, how wide, how long, and whether it was one rock, natural rock, and my belief is it was natural rock. I thought when that was through I was done.

Q. (Second question above repeated.)

A. Well, I judge it to be 25 or 30 feet—that is, to the highest point of the rock.

Mr. HAGNER : From the edge of the scow to the highest point of the rock ?

The WITNESS : Yes, sir.

Q. From the highest point of the rock, where you measured and put the measure stick, to the outer edge of the rock, how far was it ?

A. I never measured.

Q. You have been there and saw it and walked over it ?

A. This part is all covered up with bottom.

Q. Give your best opinion about the distance from there to there (indicating on the model)—that is, from the highest point of the rock to the edge of the rock in a horizontal line ?

A. I never measured that ; I cannot answer that truthfully.

Q. You understand what I mean ? How far you would have to come out there to let a line drop to strike here (indicating) on the edge of the rock ?

A. I understand you.

165 Q. It is pretty abrupt as you drew it.

A. You cannot draw it exactly. You can make an imitation of a turkey, but it is not good to eat. No, sir ; I never measured that ; I cannot answer that truthfully, only by guessing.

Q. But, as you have drawn this, the point outside the outer edge

of the rock is as far from a line drawn down that way here (indicating) as it is that way (indicating). You know that the rock did not come at the point directly where you marked it?

A. I cannot answer for any more of this rock than where I followed down. It is only my idea that the rock is in this shape after you leave three or four feet of the rock. This (indicating) is the solid rock, and this is the bottom, only covered with six or eight inches.

Q. What I am inquiring about is the distance from the point where you marked the highest point of the rock to the outer edge of the rock.

A. That is something I did not measure, and I never paid any attention to that; I might say six feet and maybe eight.

Q. Did you scrape the dirt off the outside edge?

A. No, sir.

Q. Mark on here about how far the dirt came up on the rock (indicating.)

A. I judge about four feet. This here top—I remember climbing up on the rock and never paid any attention to it. I know it is all a round surface. I know it is one rock until I came up here—that is, about where I started—until I came to the middle of it. After I came back I found it to be somewheres about 8 or 10 feet.

Q. What I want to know is what you know about the outer edge of the rock out towards the channel and how much of that  
166 rock you explored and how much of it you stripped. You cannot give any more full or accurate description of the rock—the outer edge towards the channel—than you have already given?

A. No, sir.

Redirect examination.

By Mr. HAGNER:

Q. You spoke of dust; what do you mean by dust?

A. It is a hard substance; I took it to be rock dust—dust from the mill—stone dust.

Q. What was the size of this stone you were inclining the nozzle up to—as big as a quart cup or as big as an egg?

A. It was about the size of an egg.

Q. When you say the stone was not covered do you mean to say that it was not covered with water, or do you mean to say it was not covered with this dust you speak of?

A. Not covered with dust.

Q. You don't mean to say it was not covered with water?

A. Of course not.

CHARLES J. PIERSON.

Subscribed and sworn to before me this 15th day of January,  
A. D. 1894.

RUTLEDGE WILLSON,  
*Special Commissioner.*

167 At the same time and place and in the presence of the same parties also appeared NICHOLAS HARP, a witness produced by the libellants, who testified as follows:

By Mr. HAGNER:

Q. Please state your age, residence, and occupation.

A. Age, 35; steam engineer; residence, Baltimore, Md.

Q. Mr. Harp, where were you on the day before Thanksgiving?

A. In Georgetown.

Q. Did you see Capt. Hankins and Mr. Pierson, who has just testified, there?

A. Yes, sir.

Q. What did you do there—where were you to begin with? What was done there and where were you?

A. I was on the scow attending to Mr. Pierson.

Q. You attended to Mr. Pierson?

A. Yes, sir; in the diving suit.

Q. You attended to Mr. Pierson while he was in the diving suit?

A. Yes, sir.

Q. Did you and Capt. Hankins aid the diver in the measurement of the depth of the water with that pole with his name on it? Did you see the captain write his name on that pole 29th of November, 1893?

A. Yes, sir.

Q. You saw him mark it?

A. Yes, sir.

Q. What did he mark?

A. The pole.

168 Q. And where did he put the mark?

A. On the pole.

Q. And what was he determining with the mark?

A. He wanted to find how far it was from the highest point to the surface.

Q. The highest point of what?

A. The rock.

Q. Now, will you look at this exhibit, which has already been filed and marked Exhibit No. 5, January 11th, 1894, and see what you have put there on that exhibit?

Mr. WILSON: I object to that as incompetent and immaterial.

A. Yes, sir; there it is.

Q. What is that you have marked there? What is that you have put on that paper?

A. My name, my residence, and the distance between the highest point of the rock to the surface of the water.

Q. And what did you mark that?

A. 12 feet and between eight and nine inches.

Q. From the top of the rock to the surface of the water?

A. Yes, sir.

Q. Before the diver went down what was the arrangement made that he should do?

Mr. WILSON: Objected to as immaterial and incompetent.

A. To what?

Q. In regard to the pole.

169 A. He was to go down and signal to me when he was on the highest point of it, and I was to inform the captain when to put the pole down on the rock.

Q. Well, sir, when the pole was put down, could you tell the kind of a substance the pole was on?

A. It sounded hard like stone; rock; something of that description.

Q. You state that you were on the lighter?

A. Yes, sir; on the lighter.

Q. On the lighter in front of Mr. Smith's wharf?

A. Yes, sir.

Q. How far was the inside of the lighter to the wharf?

A. Well, I judge as I went to step off, I made a step like that (indicating one step). I cannot step further than three feet, an ordinary step, so I judge it was somewhere about three feet.

Q. What was the position of the ladder which was laid down there?

A. It was very near perpendicular. It may have had a foot or eighteen inches less.

Q. How long have you been helping marine divers?

A. 17 years.

Q. How much do the boss divers charge?

A. That all depends on circumstances.

Q. How much was Mr. Broome to receive from Mr. Lord, do you know?

Mr. WILSON: I object to that. It is not the best evidence.

Q. If you know it.

A. I know it. Sometimes—we try the same as every one else—sometimes it is one price and sometimes it is another. It all depends.

170 Q. What does a diver generally charge for a man per day?

What is the general charge?

A. It ranges from twenty-five to fifty dollars a day.

Q. Now, does that include one or two divers?

A. It includes two if it takes two.

Q. Suppose you had three divers, what would they ask?

A. We never have three divers on one job.

Q. When you have one diver, what do you charge?

A. It is all the same. If it is three hours, it is just as much as five or ten hours.

Q. How long does a diver do work?

A. Eight hours.

Q. And they charge 50 a day?

A. Sometimes \$40.

Q. The ordinary charge is \$50 a day ?

A. I said \$25 to \$50. It depends on circumstances altogether what is charged.

Q. Are you certain, Mr. Harp, that there was only one lighter between the wharf and the place where the captain placed the pole at that time, on that day ?

A. Yes, sir.

Cross-examination.

By Mr. WILSON :

Q. Where did you stand and where did the captain stand when he took the stick and sounded to the top of the rock ?

A. He was out in a small boat.

Q. Were you with him in the small boat ?

A. No, sir.

171 Q. Where were you ?

A. On the scow.

Q. How could you tell on the scow what he struck with the pole he held, he standing on the small boat ?

A. By the way it went down. If I take a pole or anything and put it down on a soft substance, it will settle ; but if you take a pole and put it down on any hard substance, it will stay there.

Q. I understood you to say you could tell by the way it sounded. Could you hear the sound ?

A. Well, I think I could ; yes, sir.

Q. Did you hear the sound ?

A. I think I did.

Q. What kind of a sound was it ?

A. A kind of—I cannot describe it. I cannot make a model of of a sound.

Q. But you heard it ?

A. Yes, sir.

Q. More than one ?

A. No, sir.

Q. Just heard a little tap on the rock ?

A. A little like you would if you put anything down.

Q. Where exactly were you standing on the scow ?

A. Exactly ?

Q. In reference to the chute, to the stone chute ; when you examined the rock.

A. The chute was not there.

Q. But the place was there where it was. You know where it was, didn't you ?

172 A. No, sir. There are some three or four chutes around there.

Q. Was not the long chute there ?

A. No, sir.

Q. Sure of that ?

A. Not when we measured the rock the long chute was not there. If there was a chute there, there was not a chute there as long as



when we were up there on the schooner. Now, there might have been a chute up there, but it did not extend out as far as when we were on the schooner.

Q. With reference to the chute that was there, where were you standing on the scow?

A. I didn't say there was a chute there. I said if there was a chute there.

Q. Was there any chute there, to the best of your recollection, when you made these measurements?

A. No, sir.

Q. No chute along there?

A. No, sir.

Q. What was on the wharf?

A. A whole pile of stone; a crusher. I believe that is what they style it.

Q. What day was it the captain made that measurement?

A. It was the 29th of November.

Q. How came you to be there?

A. I was sent there.

Q. By whom?

A. By Mr. Broome.

173 Q. What for?

A. To examine the rock.

Q. What was your part of the business?

A. To put the suit on Mr. Pierson and to see if everything went on properly. I attended to him.

Q. Had your pump and lines there?

A. Yes, sir.

NICHOLAS S. HARP.

Subscribed and sworn to before me this 15th day of January, A. D. 1894.

RUTLEDGE WILLSON,  
*Special Commissioner.*

Whereupon the session adjourned to meet on Tuesday, the 16th of January, 1894, at 3 o'clock, by mutual consent of counsel.

JANUARY 16TH, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted at the office last mentioned.

Present: Same counsel for respective parties as last noted.

Whereupon HENRY W. BREWER, a witness produced on behalf of libellants, being first duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. Please state your age, residence, and occupation.

A. I am a civil engineer; aged 57 years; No. 3318 O St. N. W.

Q. And surveyor?

A. Yes, sir.

174 Q. State, please, Mr. Brewer, whether you were called upon by me to make a survey of the schooner Ellen Tobin and where she was when I called upon you to make that survey, and generally the particulars of that survey.

A. She was sunk opposite these two wharves here (indicating on plan), just in the position I have shown her in this plat.

Q. This paper before you is what?

A. That is a plat showing the lines of the property where they crossed the schooner and the position of the schooner.

Q. What was this property?

A. The Potomac Stone Company to Charles G. Smith and Charles G. Smith, Jr.

Q. Described in the lease?

A. Yes, sir; in the lease, liber 1573, folio 179.

Q. State whether or not that plat is made according to scale.

A. Yes, sir.

Q. State the scale.

A. Five feet to one inch.

Q. Five feet to one inch?

A. Yes, sir.

Q. And everything shown on that plat is, you say, reduced to a scale?

A. Yes, sir.

Mr. HAGNER: I now introduce this plat in evidence, to be marked Libellants' Exhibit No. 7, Brewer.

Q. Now, what is this at the head of the plat, this part (indicating)?

A. It is the profile along this line, from A to F.

175 Q. A profile of what?

A. A profile of the vessel on a line on the deck from A to F through the center of the vessel.

Q. That is longitudinally through the center of the vessel from A to F?

A. Yes, sir.

Q. This is what (indicating)?

A. That is the mizzen-mast or hind mast of the vessel.

Q. That is the rear mast of the vessel?

A. Yes, sir; and the forward hatch is here (indicating).

Q. The forward hatch is here—beyond the what?

A. Beyond the mainmast.

Q. The forward hatch is beyond the mainmast?

A. Yes, sir.

Q. Now, state, if you can, by looking at that map, how far the schooner when she was there sunk on the rock or other obstruction—how far her starboard or right side was from the fourth pile as marked here on the wharf.

A. I can approximate it. I guess about 28 feet (witness being handed rule and measuring).

Q. How far from the stone-elevator was the nearest point to the

starboard or right side of the vessel—from the stone-crusher or stone-elevator?

A. About 27½ feet.

Q. Now, how far from the west end of the elevator or stone-crusher was the nearest point on the starboard side of the vessel opposite, say, the middle of the forehatch?

A. About 28 feet.

176 Q. What is the distance between the wharf and the river side of the elevator?

A. It will average about a foot.

Q. State what the condition of the mainmast was or is according to that map.

A. The mainmast is back from the line. This was at the place the mainmast was (indicating). It was pushed over to that side, to the out-river side.

Q. That line (indicating) is drawn from center to center, and that would go along the mainmast (indicating)?

A. It is the plat or profile showing how much the mainmast was raised up.

Q. The mainmast is raised up?

A. Yes, sir; the profile shows it.

Q. The profile shows that?

A. No; not the mainmast; the deck at that point.

Q. The deck beside the mainmast was raised how much?

A. I could not tell how much the mainmast was raised up; it was only the deck.

Q. How much?

A. About a foot and a quarter.

Q. What point does the profile show as the highest point at which the deck of the vessel was raised up above its ordinary condition?

A. At the windlass.

Q. Do you know where the windlass was and what it was for?

A. I don't know positively. I took it for granted it was to hoist the centerboard. I am pretty sure that was what it was for.

Q. Mr. Brewer, will you tell us from the plat what the distance is from the down-river end of the elevator or stone-crusher to

177 the first pile marked there?

A. From the elevator proper?

Q. Yes; from the elevator proper.

A. That is about five feet.

Q. Now, will you tell us what is the distance from the down-river line of the lease of which you have spoken from the Potomac Stone Company to Charles G. Smith and Charles G. Smith, Jr., to the first pile?

A. 2.75.

Q. 2.75 what?

A. Feet.

Q. Two and seventy-five hundredths feet?

A. Yes, sir.

Q. What is the distance from the middle of the first pile marked on this plat to the middle of the second pile?

A. The same distance, 2.75 feet.

Q. What is the distance from the second pile down river to the third pile down river?

A. 9.65.

Q. What?

A. Feet; all feet.

Q. What is the distance from the third pile down river to the fourth pile down river?

A. 13.65 feet.

Q. Have you stated when you did this work?

A. November 14th, 1893, this plat was made. I made this a day or two before that.

Q. How long before?

A. I was a couple of days on it.

178 Q. What is the distance from the down-river line of the lease which I have already mentioned to the farthest pile down river shown on the plat?

A. This is 28.80 feet.

Q. Please state how far apart the up-river line of the lease from the Potomac Stone Company to Charles G. Smith and Charles G. Smith, Jr., and the upper line of that lease are.

A. 71.25 feet.

Cross-examination.

By Mr. WILSON:

Q. What are the two lines marked here on the river front opposite the vessel (indicating)?

A. This is the wharf line (indicating) and this is the line showing the elevator or machinery—the stone bins.

Q. The outer line is the wharf line?

A. Yes, sir.

Q. And the inner line is the line of the bins or the building, whatever it is?

A. Yes, sir.

Q. Is it elevated above the line of the wharf?

A. This building?

Q. Yes.

A. Yes; it sits up on a post.

Q. How far is it from the building to the edge of the wharf?

A. It will average about a foot; it is not regular.

Q. When you were measuring there did you see the stone-crusher?

179 A. It is up at this end (indicating).

Q. Mark about where it is.

A. I didn't mark it.

Q. Can you mark it on there (on the plat)?

A. I should think it is somewhere along there; somewhere in that neighborhood (witness indicating on the plat the position of the stone-crusher).

Q. Is the chute leading from the crusher down to the edge of the wharf?

A. No, sir; I think there is a chute through here; somewhere along about the center of this building here.

Mr. HAGNER: May he mark on this plat showing what building he is talking about?

Mr. WILSON: He can say what he wishes.

The WITNESS: It is located somewhere near the center of the elevator.

Q. Have you marked where the chute went from?

A. It is about there, I should say (witness indicating on the plat in pencil the position of the chute).

Q. Forward of the forehatch here?

A. It would be aft of the forward hatch.

Q. Were you on the vessel?

A. Yes, sir.

Q. Was her deck above water?

A. Yes, sir.

Q. What was being done to her while you were there?

A. Nothing.

180 Q. Who was on board of her?

A. Nobody but the men who helped me. I believe the captain was on while I was there.

Q. What was his name?

A. I don't know.

Q. That was on what day?

A. I should say a couple of days before this map was made. I think this was made on the 14th. I was two days making it.

Mr. HAGNER: The 14th of what?

A. The 14th of November, 1893.

Q. Had this portion of the vessel here any water on it?

A. No, sir.

Q. You didn't see the state of her hold?

A. No, sir; I could not see. The water would come up like that. She had a list to port.

Q. How much of a list?

A. I don't know. I suppose that would be about a foot of water there, maybe, at high tide.

Mr. HAGNER: Was the foot of water on the outside, at the aft cabin?

The WITNESS: I think that is the point right there (indicating). On the deck, near the aft cabin, there was a foot of water.

Q. From your measurements, what is the distance from the center of the mizzen-mast to the wharf?

A. At right angles?

Q. To the edge of the wharf, straight?

A. About 43½ feet.

Q. What is the distance from the center of the mainmast to the wharf?

A. About 43 feet and a half.

181 Q. What is the distance from the foremast to the wharf?

A. About 40 feet—39 feet, I reckon.

Q. What is the width of the vessel at the foremast?

A. Between 28 and 29 feet.

Q. What is the width of the vessel at the mizzen-mast?

A. About 28 feet.

Q. And the mainmast?

A. About 28½ feet.

Q. That is by actual measurements?

A. Yes, sir.

Q. By actual measurement what is the distance from the vessel's edge opposite the mainmast to the edge of the wharf?

A. That is about 27½ feet.

Q. How far from the foremast?

A. About 25½ feet to the wharf opposite the foremast.

HENRY W. BREWER.

Subscribed and sworn to before me this 20th day of January,  
A. D. 1894.

RUTLEDGE WILLSON,  
*Special Examiner.*

GEORGE W. BELL, a witness produced on behalf of the libellants,  
*who*, being first duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. Captain Bell, state your business and occupation and how long you have been in that occupation?

A. I have been master of a tugboat about 28 years.

182 Q. State generally, if you remember, what occurred on Sunday, the 6th of August, in respect to the schooner Ellen Tobin.

A. Well, I arrived in Georgetown that morning—

Q. On what?

A. On the steamtug "Potomac."

Q. Of which you are the captain?

A. Of which I am the captain; yes, sir.

Q. Well?

A. As near as I remember, about 9 o'clock, and landed at the wharf—at Agnew's coal wharf—and went right straight home from there, which was 920 New York Ave., and changed my clothes, and just as I got through changing my clothes I got a message by one of my firemen from the capt. of the Ellen Tobin that he wanted me to come down there and see if I could be of any assistance to him, that the vessel was sinking, and I went right straight down as soon as I could get down alongside the Tobin with the tug as near as we could, and he asked me if I thought I could get him ashore somewhere on soft bottom; that his vessel was supposed to be aground on a rock; he said she was aground and leaked badly. Well, I said to him that I thought it was doubtful whether we could get—that is, if we pulled him off the rock, that he might sink in deep water before we could get him aground on soft bottom, and I thought the

best thing for him to do, if he could, would be to get a fire-engine to come down and keep the vessel pumped out until we could make some other arrangements for some other pump, and I volunteered to come up with him and show him the fire-engine house; so he did so; we both went up together. The fireman said that they could — send a fire-engine out for that purpose; that it would be against the rules, though they did telephoone to the chief and asked  
183 his permission, which was refused, and they spoke something about some other pumps that they might possibly get to use, but they did not know whether they were in order—whether they could be used or not—and then we went right back down to the vessel, and we found she had been leaking so fast it was then a more hopeless case; she was still further down in the water, and we concluded that we could not do anything; that it would be best to leave her alone, though the captain did go off after that to see about these pumps; he was gone for I cannot say how long, and he came back and said they might as well knock off pumping, as the vessel was then nearly full of water, and better let her lay where she was.

Q. Captain, suppose that vessel had been your own, what would you have done with her?

Mr. WILSON: I object to that as immaterial and incompetent.

A. Well, I told the captain what I thought I would do. I was perfectly honest about it. If it was my own vessel, I should have done the same thing.

Cross-examination.

By Mr. WILSON:

Q. What time was it when you went up the river on Sunday morning?

A. Well, sir, I think it was nine o'clock when I landed at the wharf up there.

Q. A little before that when you passed the Tobin?

A. A little before. It is only about three squares from where the Tobin was.

184 Q. Did you go close to the Tobin?

A. About off in the middle of the channel, I suppose.

Q. How far?

A. Not very far.

Q. Did you see anybody on board?

A. Yes, sir.

Q. Who did you see?

A. I saw some men there pumping. I saw they were pumping.

Q. Any signal made to you?

A. No, sir.

Q. See the captain there?

A. No, sir; I could not say I saw the captain. I saw several people on board.

Q. They did not hail you or make any signal?

A. No, sir; I did not see any.



Q. Did you notice anything particular about the condition of the boat at that time?

A. No, sir; only she seemed to be leaking very bad by the pumping.

Q. By the pumping?

A. Yes, sir.

Q. How many men were pumping?

A. I could not say how many there were.

Q. How long was it before you got the message after you passed the vessel going up?

A. I suppose I had been home about an hour.

Q. You had been home about an hour?

A. Yes, sir; when I got the message from the captain.

Q. And you went down to the boat then?

185 A. And then I went right straight down to the boat.

Q. Did you go down to the tug?

A. Not from my house.

Q. Did you go down to the tug and then down to the vessel on the tug?

A. I don't mean to say I went down to the tug. I mean to say I went down to the vessel first from the house.

Q. When you got down to the vessel what did you do?

A. I told the fireman to tell them to bring the tug down as soon as they could. The mate brought the tug down to the vessel with their crew. I didn't come up to the tug.

Q. What time did the tug get there?

A. I suppose about 11 o'clock.

Q. And how long did she stay there?

A. She stayed there until after 12.

Q. When did you go away from the vessel?

A. Shortly after 12.

Q. When you passed the vessel first that morning you didn't see anything to indicate she was in distress, I understand you to say?

A. There was no signal of distress made to me at all.

Q. You didn't make any effort to get her off?

A. No, sir; I thought it was doubtful.

Q. Could you tell whether she was afloat or not?

A. Well, I didn't try to tell that.

Q. How much water did she have in her when you left; I understand you left at 12 o'clock?

A. Shortly after 12. I could not say exactly, but it was plain in sight above the cargo in the hold.

186 Q. Could you tell where the leak was?

A. No, sir; I didn't look for the leak at all.

Q. And you left at 12 o'clock?

A. Very shortly after.

Q. About 12 o'clock?

A. About 12 o'clock.

Q. Was the captain then on board?

A. I believe so. I could not say he was at that time or not.

Yes, sir; he was there at 12 o'clock, because I know that. I think I heard him say it was 12 o'clock, and that was the time he knocked off pumping. He said that they could knock off.

Q. They stopped pumping at his order?

A. Yes, sir.

Q. At 12 o'clock?

A. At 12 o'clock.

Q. What time did she sink; you don't know of your own personal knowledge, of course?

A. I considered she was sunk then. She was full of water then.

Q. When she touched bottom you don't know?

A. No, sir.

Redirect examination.

By Mr. HAGNER:

Q. Captain, you said the mate brought the tug around; do you mean the mate of the tug Potomac or the mate of the vessel?

A. My mate.

GEORGE W. BELL.

Subscribed and sworn to before me this 20th day of January, A. D. 1894.

RUTLEDGE WILLSON,  
*Special Commissioner.*

187 The further taking of testimony was postponed until Saturday, the 20th of January, 1894, at 3 o'clock p. m., at the same place.

JANUARY 20, 1894—3 o'clock p. m.

Met pursuant to adjournment.

Present: Same counsel for respective parties as last noted; and—

HARRY A. WISE, a witness produced on behalf of libellants, being first duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. What is your full name?

A. Harry A. Wise.

Q. What is your name, age, and residence?

A. 29 years of age; residence, 807 8th street N. W.; occupation, photographer.

Q. Who are you working with?

A. C. M. Bell.

Q. Where is he; on the Avenue?

A. Yes, sir; 463 and 465 Penna. avenue.

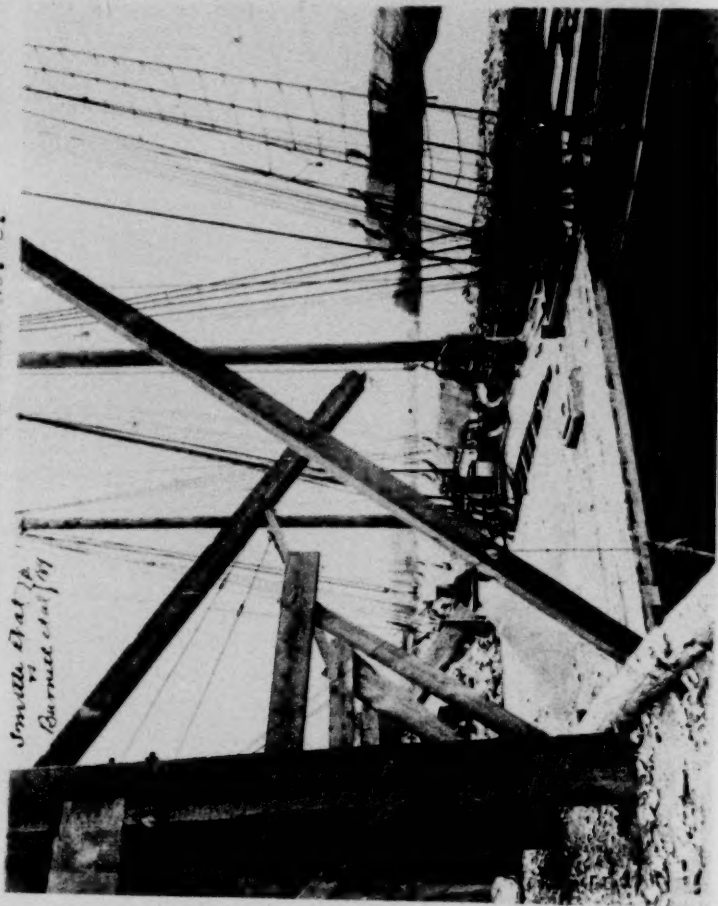
Q. State, Mr. Wise, what these are (counsel handing witness two photographs).

A. A schooner, I believe.

Q. What are they themselves?

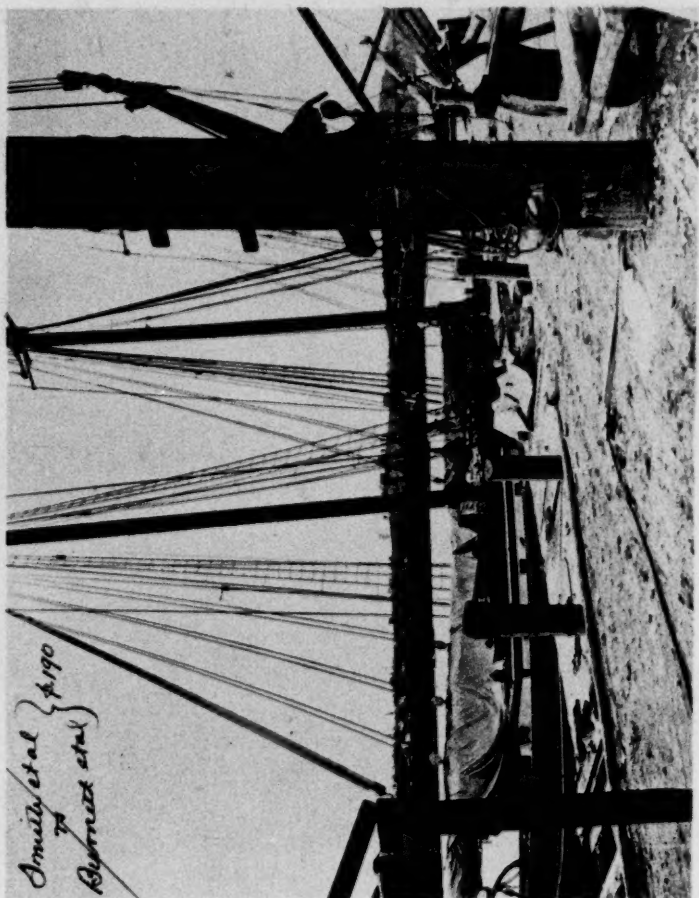
Liberty's Export No. 8.

Smith & Co  
Barnes & Co



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Libellants' Exhibit Wisc No. 9.



*Amelia et al } \$190  
vs  
Byrnes et al }*

A. Photographs of the schooner.

188 Q. Did you take those photographs?

A. Yes, sir.

Q. What have you numbered them?

A. I have numbered them 1 and 2.

Q. Have you any means of telling where those photographs were taken; any memorandum or anything of the kind?

A. I have a memorandum; yes, sir.

Q. Where was number one taken?

A. Number one was taken on the edge of the wall, five paces west of stone-crusher or elevator. Number two was taken five paces north of derrick-house, on a line one pace from the west line thereof, being for about eight paces north of the edge of the wharf.

Q. Now, what date were these photographs taken?

A. November the 13th.

Q. Both made on November the 13th?

A. Yes, sir; 1893.

Mr. HAGNER: I offer these photographs in evidence, to be marked Libellants' Exhibits Numbers Eight and Nine, Wise.

Mr. WILSON: I object to the introduction of these photographs in evidence as incompetent and because they were taken long after the alleged injury.

(Here follow Exhibits marked pp 189 & 190.)

191 Q. Was the vessel sunk that you could see?

A. Yes, sir; you could see plainly that the vessel was sunk.

Q. This is at what place? Where did you take these photographs?

A. That is the Potomac river, between High street and the next street, I think, Georgetown.

Q. Next street east or west?

A. Next street west.

Q. You don't know the name of the wharf?

A. No, sir; I don't.

Q. Do you know the name of the schooner, or does it show anywhere on the photographs what the name of the schooner is?

A. Yes, sir.

Q. What is it?

A. I cannot see. You can see; "El. Tobin."

Q. That is on what picture?

A. Number two.

Mr. WILSON: I object to the questions as incompetent and irrelevant.

Cross-examination.

By Mr. WILSON:

Q. Do these photographs represent the vessel as being sunk?

A. Yes, sir.

Q. Was she sunk?

A. She was sunk; yes, sir.

Q. How far was it from the water to the bow, to the edge of the vessel from the water?

A. From the water to the top of the boat?

192 Q. How far from the water to the deck?

A. Very close. It seems to be about two feet or a foot and a half.

Q. Was the deck on a level or even?

A. Yes, sir.

Q. Not canting either way?

A. No, sir; I think not.

Q. Perfectly straight?

A. Yes, sir.

Q. How do you know she was sunk?

A. I could see she was sunk. She was full of water.

Q. Resting on the bottom?

A. Yes, sir; resting on the bottom. She was full of stone and full of water at the same time.

Q. Was she full of stone?

A. I don't know about being full of stone. There was stone in it and water, too—filled up with water.

Q. How deep was the water over the stone?

A. I could see stone coming up out of the water.

Q. Floating?

A. No, sir.

Mr. HAGNER: I object to all these questions, because this gentleman was simply asked as a photographer whether he took these pictures.

HARRY A. WISE.

Subscribed and sworn to before me this 27th day of January, A. D. 1894.

RUTLEDGE WILLSON,

*Special Comm'r.*

193 At the same time and place and in the presence of the same parties also appeared WILLIAM E. BELL, a witness produced on behalf of the libellants, who, being duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. What is your name, residence, age, and occupation?

A. My name is William E. Bell; residence, 1229 30th street, Georgetown; age, sixty-five; occupation, captain of steam-tug.

Q. Captain, I want to ask you how long you have been engaged in your present occupation as captain of vessels.

A. I was captain of vessels here for forty-two years.

Q. Will you state, if you please, if you were, as such, pretty familiar with the harbor of Georgetown?

A. Yes, sir.



Q. Near High street, for instance?

A. Yes, sir.

Q. Do you know of the existence of any rock—natural rock or natural obstruction—or other obstruction near High street, in Georgetown?

A. There used to be. I have not been there lately; about five years. There used to be an obstruction west of High street.

Q. Can you tell us where that obstruction was about there? Locate it as near as you can.

A. Well, from an alley west of three or four houses, three or four brick houses on the corner of High street, three or four brick warehouses just west of the alley, and then from an alley leading down there between that and the warehouse up to the foot of Potomac street, there were obstructions all along there.

194 Q. Do you know where Mr. Barrett's property was?

A. Yes, sir.

Q. The wharf property of Mr. Barrett?

A. Yes, sir.

Q. And what was the other name of the people who owned it?

A. J. N. Fearson owned it when I was there. He died and left it to Mrs. Barrett.

Q. What was Mrs. Barrett's name afterwards?

A. I don't know who she married; I have forgotten it now.

Q. That is the property the stone is in front of?

A. Yes, sir.

Q. Will you tell us what experience you ever had with that stone?

Mr. WILSON: I object to that as incompetent and immaterial.

A. I have had vessels on it, and I had my own boat on it once.

Q. Do you know what the depth of the water was on that rock when your vessel was on it?

A. When my vessel was on it there was not but eight and a half feet, as that was about her draught.

Q. What was she?

A. It was a tug. It was an extreme low tide and we were after having a northwester, and I laid inside fast to the wharf, undertaking to get away from it and struck it, and then I had the schooner Ann E. Philistine in; but at one time—

Q. Now tell me, if you know, how far that rock is out into the river from the line of the wharf.

195 Mr. WILSON: The question is objected to as irrelevant and immaterial, no proof having been given as to the position of the rock with reference to the wharf.

A. I think from 30 to 35 feet. I reason I would locate the rock as being that—when I used to come to bring vessels up to that wharf I used to get them inside next to the wharf below that property and then bring them along up inside of it and get clear.

Q. You would run them in what direction?

A. West; and I have gone to that property to haul vessels out

and could not get them out and had to haul them back before I could get them away.

Q. When you say haul back, do you mean east or west?

A. I mean haul them to the east.

WM. E. BELL.

Subscribed and sworn to before me this 25th day of January, A. D. 1894.

RUTLEDGE WILLSON,  
*Special Comm'r.*

Whereupon the session adjourned to meet on Wednesday, the 24th of January, 1894, at 3 o'clock.

196 In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	} Admiralty. No. 379.
vs.	
CHARLES G. SMITH <i>et al.</i>	

Messrs. Nathaniel Wilson and Messrs. Edwards & Barnard, proctors for respondents.

GENTLEMEN: Please take notice that I shall continue the examination of witness on behalf of libellants on Tuesday next, January 30th, at 3 o'clock p. m., and on Wednesday, January 31st, at the same hour and place, before the special commissioner, Rutledge Willson, Esq., at his office, No. 406 5th street N. W.

RANDALL HAGNER,  
*Proctor for Libellants.*

Service accepted.

Jan'y 25, 1894.

EDWARDS & BARNARD.  
NATH'L WILSON.

197 TUESDAY, January 30th, 1894.

Met pursuant to *motion*, hereto attached, to counsel for respondents.

Present: Same counsel as before, and—

CHARLES GODFREY, a witness produced by the libellants, being duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. What is your age, residence, and occupation?

A. Charles Godfrey; 49 years of age; occupation, engineer.

Q. Where do you reside?

A. No. 3228 Grace St., Georgetown.

Q. Are you occupied now?

A. No, sir.

Q. Mr. Godfrey, will you state where you were employed during the month of August last?

A. By Mr. Smith.

Q. Will you state whether you saw the Ellen Tobin come into the wharf?

A. I did, sir.

Q. State when it was and all about it, as far as you know?

A. Well, sir, as far as I know about the vessel, she came in on Wednesday and hauled in on Wednesday evening. On Wednesday evening late we quit work and I happened to be at the wharf, and I hauled back and took the end of the line and fastened it to the pile at the wharf, and the mate thought it was not far enough back and he untied it and made it fast far enough back.

Q. Did you hear any conversation take place at that time between the foreman of the wharf, Mr. Speaker, and any one?

198 A. I heard the captain asking about the water.

Q. What did he ask him?

A. He asked him how much water was there, and he said, "Plenty of water." Then he asked him "what did he call plenty."

Q. What did he say then?

A. He said fifteen feet.

Q. Did he ask the captain any question about his draught?

Mr. WILSON: I object to this question as immaterial.

Q. Did you hear Mr. Speaker ask the captain anything?

A. No more than ask what the vessel drew.

Q. What did he say?

A. Fourteen feet. I didn't hear any more than that. I was at the wharf, with my coat in my hand, going home.

Q. Where was the mate?

A. The mate was on the scow—on one of the scows.

Q. That is the same as a lighter?

A. Yes, sir.

Q. State what was done about the loading of the vessel? When did they begin to load?

A. On Thursday morning between nine and 10 o'clock, I think, they commenced loading her.

Q. How long was she loading?

A. Well, from Thursday until Saturday.

Q. What time did they knock off on Saturday?

A. They knocked off at five o'clock that Saturday, sir.

Q. Did you hear Mr. Speaker say anything at that time?

A. No; no more than I asked him.

199 Mr. WILSON: Question objected to as leading, incompetent immaterial, and hearsay.

Q. What did you ask him?

A. I was going from the engine-room and we left the engine-room, me and Mr. Speaker, going around from the engine-house. I asked him, sir, "Mr. Speaker, are you going to shove the vessel out and put another scow in between her?"—the men were all going away—he says, "No;" he says, "She will lay all right." I said, "Of course you are the boss," and no more was said, and, of course, we parted.

Q. Do you know of any other vessel being pulled off from that same place where the Tobin was sunk?

A. I knew of one, but I don't know her name; I can't call her name.

Q. What tug pulled her off?

Mr. WILSON: Question objected to as immaterial and incompetent.

A. The "Minerva" was one.

Q. Who owns the Minerva?

A. Mr. Smith.

Q. And another tug?

A. Yes, sir; and another tug, but I don't recall its name. I didn't pay any attention to it.

Q. It was in the same place?

A. The same place; yes, sir.

Q. Do you remember when that was?

A. No, sir; I didn't take any account of it at all.

Q. Do you remember whether it was in the first part or the last part of the season?

A. That I could not say; I think it was the last of the season.

Q. The last of the season?

200 A. Somewhere about that; I could not say.

Cross-examination.

By Mr. WILSON:

Q. You are the engineer?

A. One of the engineers.

Q. How far was this from the edge of the wharf?

A. What do you mean, sir?

Q. From the water?

A. To the engine I ran?

Q. Yes.

A. I suppose it was as far from here as, well, to those posts across the way (indicating).

Q. How many feet?

A. Between 300 feet; maybe more and maybe less. I never measured it.

Q. You had nothing to do with the management of the wharf?

A. I was on the wharf when she hauled in.

Q. You have nothing to do with the management of the wharf?

A. No, sir.

Q. That is no part of your business?

A. No, sir.

Q. No part of your business to give any directions about the position of the vessel?

A. No, sir.

Q. What were your duties?

A. My duties were to assist the chief engineer.

201 Q. Who was the chief engineer?

A. Mr. Speaker.

Q. The gentleman you have spoken of?

A. Yes, sir; the engineer and foreman of the yard.

Q. You ran the hoisting apparatus?

A. I did.

Q. That was your particular business?

A. I attended the big engine.

Q. You attended the big engine, too?

A. Yes, sir.

Q. Under his direction?

A. Under his direction; yes, sir.

Q. When did you leave your employment at the wharf?

A. I don't know exactly what time Mr. Smith shut down and we were laid off. It was some time after the boat was at the bottom—after she was sunk.

Q. When did you first repeat the conversation you say you had with Mr. Speaker?

A. In regard to the moving of the vessel?

Q. Yes, sir.

A. On Saturday evening, about a quarter to six, I guess it was, when we left the engine-house.

Q. How came you to attend here today as a witness?

A. I was summoned.

Q. By whom?

A. By Mr. Hagner.

202 Q. Who did you tell first of this conversation you say you had with Mr. Speaker?

A. Nobody but him.

Q. When?

A. On Saturday.

Q. Where?

A. At the yard, in the engine-house.

Q. What were you doing there?

A. Just leaving my work, sir.

Q. After that happened—after all that conversation occurred—who did you tell?

A. I didn't tell any one.

Q. Did you never mention that conversation to any one until you mentioned it here?

A. No more, sir; no more to any one.

Q. You never had any talk with any one?

A. No more than a conversation with Mr. Hagner.

Q. When?

A. On last Wednesday, was it not, Mr. Hagner, or Thursday—

which?

MR. HAGNER: I had two conversations with you. Testify about it to the best of your recollection.

The WITNESS (continuing): A week or ten days ago he came to my house.

Q. Up to that time you never spoke about this conversation to anybody?

A. No, sir; I never spoke to any one about the vessel except to Mr. Hagner.

Q. That is the first time you said anything to anybody after the conversation occurred?

203 A. Yes, sir.

Q. How did they happen to call on you?

A. I suppose the captain wrote my name down.

Q. Did you have any conversation with the captain about it?

A. I have not seen the captain for three months, or six months, or something like that.

Q. You haven't seen him, have you, since this conversation?

A. No, sir.

Redirect examination.

By Mr. HAGNER:

Q. As I understand from what you say, you are the assistant engineer there?

A. Yes, sir.

Q. Did you assist at both engines at any time?

A. Yes, sir; carrying second-class papers.

Q. You attended at both engines?

A. Yes, sir; at both engines.

Q. Suppose both engines were not in use, what did you do under those circumstances when the engines were not running?

A. If they kept me in the yard at work, I helped to repair engines; if not, I was laid off or mended belts.

Q. Did you or not assist in getting vessels in there at the wharf?

Mr. WILSON: Objected to as immaterial, incompetent, and leading.

Q. Did you assist in getting this vessel there?

204 A. No more than being on the wharf, and the mate passed the line to me. He could not get to the pile at the time to put the line over, and he passed it to me.

Q. I neglected to ask him a question on direct examination which I would like to ask now, which is this: How much stone could the elevator supply in a day?

A. Well, I could not say exactly. I suppose she would run—

Mr. WILSON: Don't say what you suppose in answer to the question.

The WITNESS (continuing): If the crusher is in good trim and good running order, which she has been, I should judge she could run from seventy to eighty tons.

Q. Up to what; up to how many tons; how much more?

A. I suppose about ninety tons. She might run about ninety tons a day if she was in good trim and didn't break down.

Q. Could any load of stone be put into the long chute in any way except from the elevator proper?

A. None at all, sir.

Mr. WILSON: Objected to as incompetent.

Mr. HAGNER: The question was answered first, unfortunately.

Mr. WILSON: Question and answer objected to.

Q. There are some bins there. Those stone bins are meant for what?

A. They are meant for loading scows or small, light-draft vessels, if you choose to get them in there.

205 Q. Can the chutes from those bins load a large vessel?

A. No, sir.

Mr. WILSON: I object to the question and answer as incompetent and immaterial.

Q. Only through the tall chute, then, could a vessel as large as the Ellen Tobin be loaded?

A. That is the only one, sir.

Mr. WILSON: Question and answer objected to as incompetent, irrelevant, leading, and argumentative.

his  
CHARLES x GODFREY.  
mark.

Test: RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

Subscribed and sworn to before me this 2nd day of February, 1894.

RUTLEDGE WILLSON,  
*Special Commissioner.*

At the same time and place also appeared JOHN HANKINS, who was recalled for further examination, and after being duly sworn testified as follows:

By Mr. HAGNER:

Q. Captain, when did you return here to Washington?

A. I arrived here yesterday, just before two o'clock.

Q. Yesterday at two o'clock?

A. Yes, sir.

206 Q. Captain, in your original testimony you were asked whether or not the Ellen Tobin had any accident of any kind, and you replied that you could not remember any accident that she had had. I want to recall you for the purpose now of asking you when you first told me of what may be regarded as an accident—that is, the loss of an anchor at a certain time.

A. This morning.

Q. Tell us about that and when it happened.

A. We lost the big anchor and sixty fathoms of chain of Smith's island, or Cape Charles, on the fourth day of last March.

Q. At the mouth of the bay?

A. Outside of the beach.

Q. On the fourth of last March?

A. About eight o'clock.



Q. Morning or evening?

A. In the evening.

Q. What was the character of the weather then?

A. There was a gale to the westward and snowing; about north-nor'west.

Q. State how you came to lose your anchor.

A. We had been up the beach abreast of Hog island and ran back and anchored under Smith's island about 11 o'clock on the fourth of March.

Q. When?

A. In the morning, and laid there until about eight o'clock in the evening and she parted her chain. We lost our anchor and sixty fathoms of chain and then we undertook to make sail and head her up the beach, and started the rope on the foresail  
207 and the wind blew her jib away and then we hove to and lay hove to until the next day about one o'clock.

Q. Was there any injury to the body of the vessel in that storm?

A. No, sir.

Q. Once, then, Captain, in coming up the river, did you have any accident to the boom of the vessel?

A. We sprung her mizzen boom just below Maryland point on Tuesday, the day before we arrived at Fort Washington.

Q. How did it happen?

A. A squall struck us at anchor, and when it struck us it struck us with broad rap full. I might say she was laying side to the wind, and struck us square on the center.

Q. What was the condition of that boom afterwards?

A. It cracked on the under side of it.

Q. Was there any particular reason for it cracking?

A. The wind cracked it, the force of the wind.

Q. Can you give any reason, Captain, why you didn't state that when asked by Mr. Wilson in cross-examination?

A. I was thinking about any injury to the hull of the vessel and not to any spars or any accidents to them.

Q. Captain, I neglected to ask you a question, which I want to ask you now, and that was this—it was an oversight on my part—Had you any idea in the world that there was any rock at the bottom of that berth?

Mr. WILSON: Objected to as leading, immaterial, and incompetent.

A. No, sir.

208 Q. You had no knowledge of any rock there?

A. No, sir.

Mr. WILSON: Same objection.

Q. Or any idea of any rock there?

A. No, sir.

Mr. WILSON: Same objection.

Q. If you had, would you have gone in there?

A. No, sir.

Cross-examination.

By Mr. WILSON :

Q. You spoke of being in Baltimore in June, before this accident happened, I think, didn't you, in your testimony-in-chief?

A. I spoke of being in Baltimore; yes, sir.

Q. Where were you lying there?

A. Where was I lying there?

Q. At whose wharf?

A. We were lying at the wharf next to the upper wharf there; Hamilton's wharf, I think.

Q. Who were you consigned to at that time?

A. Who did I load for?

Q. Yes.

A. I think I was loading for Newberry Orrell Coal Co. I chartered through a broker there, Mr. Jones.

209 Q. What is his full name?

A. George W. Jones & Company.

Q. Where was his office?

A. No. 11 South Gay St. I always charter through a broker wherever I go, the same as I did through Mr. Lee here.

JOHN HANKINS.

Subscribed and sworn to before me this 3 day of February, A. D. 1894.

RUTLEDGE WILLSON,

*Special Comm'r.*

Whereupon the taking of testimony in this case on behalf of libellants was adjourned until the 31st day of January, at 3 o'clock, at the same place.

JAN'Y 31ST, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same parties. Whereupon—

WILLIAM H. KENSEL, a witness produced on behalf of libellants being first duly sworn and cautioned, testifie- as follows :

By Mr. HAGNER :

Q. What is your business?

A. Sailmaker and vessel-owner.

210 Q. And vessel-owner.

A. Yes, sir.

Q. As a vessel-owner what experience have you had with vessels?

A. I have been an owner since 1856, and have owned, I suppose, 60; somewheres around there. At the present time I own 26.

Q. As managing owner have you had any experience in repairing vessels?

A. Yes, sir.

Q. Have you had any experience with the schooner Ellen Tobin?

A. Yes, sir.

Q. For what length of time?

A. Ever since she was built.

Q. Ever since she was built?

A. Yes, sir.

Q. Do you know where she was built?

A. I am quite sure at Kennebunk Port, Maine, in 1874.

Q. Where did you last see the Ellen Tobin?

A. The last time I saw the Ellen Tobin was at the dock in Allison's dry dock, Jersey City?

Q. When after that?

A. I saw her anchored in the stream.

Q. When do you remember the last time you saw her?

A. The last time I saw her was the summer before last.

Q. Later than that?

A. I saw her down here, sunk; foot of what street is it?

Q. Was that in Washington?

211 A. Here in Georgetown, as she lay sunk there.

Q. What was her condition when you saw her summer before last?

A. She was in very good order.

Q. Fit to carry any kind of cargo?

A. Well found and well fitted out.

Q. Do you know how she had been kept up?

A. She had always been kept up very good.

Q. A vessel, Mr. Kensel, which is kept well repaired all the time will last longer or shorter time than one which is neglected?

A. Oh, it lasts as long again.

Q. What connection did you have with the Ellen Tobin the last time you saw her?

A. I was on a survey there.

Q. You were one of the surveyors?

A. Yes, sir.

Q. Now, without showing you that survey, Mr. Kensel, I will ask you to say what condition you found her in at the time you held the survey?

A. I found her in very poor condition. Her keel and keelsons and fore-timber broken and the upper deck raised out about three feet.

Q. The deck raised up?

A. The deck was raised up about three feet from the line where it originally was.

Q. Do you remember what the condition of the tide was at the time you surveyed her? Do you happen to remember that?

A. I think the tide was pretty well up. I am not positive on that point, but the water inside and outside was the same. We were there an hour and a half to two hours, perhaps.

212 Q. And you noticed that peculiarly?

A. Yes, sir.

Q. That the water on the inside and the outside was the same?

A. Yes, sir.

Q. What would that indicate?

A. That would indicate that the vessel's bottom was stove in. The tide rose and fell in her.

Q. What was the condition of her decks in other respects? Do you remember?

A. Well, her deck was all broken in—raised up; the vessel strained bad; decks were cut open where they were getting their cargo out.

Q. What is another name for the false keel of the vessel?

A. The false keel was oak there, about three or four inches on the bottom to keep the worms from getting into the keel. The worms never cross a seam.

Q. How would you describe the condition of the vessel, in nautical terms, at that time?

A. I would consider she was only fit to be condemned.

Q. Do you remember the condition of her shrouds at that time?

A. Yes, sir.

Q. What was it?

A. They were parted.

Q. What had caused that?

A. When she got on the rock the vessel's beams went up and the deck and mainmast went up with it, and that parted the rigging.

Q. For what length of the vessel had the keel been raised up?

Do you remember?

213 A. Well, quite a long distance; I should think from one end to the other 45 feet. It went down gradually, you know, from the center each way.

Q. From her condition at that time, what was and is your opinion in respect to whether or not she was susceptible of being repaired; what would it cost?

A. I could not exactly say what it would cost.

Q. Or whether it was worth while?

A. I would not consider she was worth repairing at all.

Q. Tell us why.

A. You would have to spend too much money on her. She was too far gone; too badly broken up.

Q. You now consider she was not worth repairing?

A. Yes, sir.

Q. You now consider and did then she was unseaworthy?

A. She was unseaworthy. Why, the vessel was sunk. Yes; I should consider she was unseaworthy.

Q. (Handing witness paper.) This is a certified copy of the condemnation. Will you look at it, Mr. Kensel. Just read it to yourself.

Mr. HAGNER: I offer this paper in evidence, which is filed in the case as Exhibit C to the libel.

Mr. WILSON: I object to the offering of this paper in evidence as incompetent and immaterial.

A. I recognize that paper.

Q. You recognize that paper as a copy of the paper that you signed when you were in the Georgetown custom-house?

214 A. Yes, sir.

Q. And swore to?

A. Yes, sir.

Q. Are or are not the facts that are therein stated true or not?

A. They are true.

Q. Did you see those other gentlemen sign this paper?

A. Yes, sir.

Q. Who are they?

A. Mr. Gokey and Mr. Agnew.

Q. Mr. Kensel, did you know the Ellen Tobin sufficiently well, and do you know about vessels and their value sufficiently well to put a valuation upon her at the time you saw her in the summer of 1892?

A. Yes, sir.

Q. Will you state, if you please, what you consider she was worth at that time?

A. I would value her at \$10,000 at that time.

Q. In the summer of 1892?

A. Yes, sir.

Q. Where was she then; do you remember?

A. She was on the dock. I saw her on the dry dock in the summer of 1892.

Q. Whose dry dock?

A. Michael S. Allison's dry dock.

Q. What was being done with her then?

A. She had been hauled to Mr. Allison's dock and was being generally overhauled.

215 Q. What do you mean by that?

A. Trying the seams and trying the butts.

Q. Do you mean by that repairing?

A. General repairs.

Q. General repairs?

A. Painting and doing anything the vessel ought to have done to her.

Q. Would you or not know if the underwriters of cargoes that were put on the Tobin had sustained loss by reason of the insurance of those cargoes?

A. I would be very apt to know if the vessel had to pay damages for a damaged cargo, because if they damaged a cargo they would have to pay for it.

Q. You would be likely to know?

A. Yes, sir.

Q. State why.

A. The inspectors, you know, are after you all the time. If the vessel is hauled on the dock, the inspector is there to see if the vessel is seaworthy or in a seaworthy condition.

Q. Inspectors of what?

A. The inspectors of the New York underwriters.

Q. And you would be likely to know?

A. I would certainly be likely to hear of it. The vessels I owned I would be positive to hear about it.

Q. Are you interested in the Tobin?

A. No, sir.

Q. What kind of a vessel does it require, Mr. Kensel, to carry cement?

A. It requires a vessel to be in perfect order, the decks perfectly tight, and in good condition every way.

216 Q. Is there any custom existing throughout this country in respect to the payment of brokers' fees by vessels which employ them to obtain cargoes?

Mr. WILSON: That is objected to as immaterial and incompetent.

A. Yes, sir.

Q. Is there such a custom?

A. Yes, sir.

Q. Throughout the whole country?

A. Throughout the whole country.

Q. What is the custom?

A. The custom is that it comes out of the freight. The owners pay it.

Mr. WILSON: I want to note an objection to the question as incompetent and immaterial.

Cross-examination.

By Mr. WILSON:

Q. Where did you say you reside?

A. Jersey City, New Jersey.

Q. Where is Allison's dock?

A. At Jersey City.

Q. You saw the Tobin there in 1892?

A. Yes, sir.

Q. Under repairs?

A. Yes, sir.

217 Q. Did you ever see her before?

A. Yes, sir; I saw her on the dock several times.

Q. How many times did you see her on the dock?

A. I think, as near as I can say, I saw her on the dock half a dozen times.

Q. What for?

A. For general overhauling.

Q. Did you ever know of her being injured or suffering shipwreck, or any accident at all?

A. No, sir.

Q. You never heard that?

A. No, sir.

Q. Where was she when you saw her here in the District of Columbia first?

A. She lay there sunk.

Q. Where?

A. At the foot of that street—

Q. In Georgetown?

A. In Georgetown.

Q. You never saw her since?

A. No, sir.

Q. Was she under water then?

A. No, sir; her upper deck was out of the water.

Q. What day was it you saw her?

A. Somewheres around the 1st of November.

Q. Do you know how long she was lying there when you saw her?

A. I think she had been there since August. I think so.  
218 I am not positive about that. When the tide came up her upper deck would have water on it.

Q. When the tide was out she was dry?

A. Her upper deck would be out of the water.

Q. Do you know how the vessel was rated?

A. That I don't know.

(By Mr. HAGNER:)

Q. By permission of counsel—whether a vessel is rated or not or whether a vessel's rate is run out or not—is it the custom of underwriters to have their inspectors inspect those vessels whenever they are repaired, and give instructions to the repairer if they see the work is not progressing properly?

A. Yes, sir; every time a vessel is repaired the inspectors inspect it always.

Q. Whether they are insured or not?

A. Whether they are insured or not. We never insure our vessels. The cargo is insured in our vessels. They keep after us just as sharp as they can. Whatever they tell you to do you have got to do, because they will insure no freight otherwise.

Recross-examination.

By Mr. WILSON:

Q. I want to ask you if you saw the keelson. How did you know it was broken?

A. You could tell by the way the whole vessel was jammed up.

Q. You could not see it yourself?

A. I could not see it because it was under water. I judged from the damage on deck where she had been raised up what must be the matter with her bottom.

219 Q. That is a matter of inference?

A. There is not much inference about it. It is a matter of fact.

Q. How could you see her bottom?

A. You could not see her bottom, but you could see her trunk moved three feet out of place, and that could not get there if the bottom was not gone and the keelson broken and the keel.



Q. You think the keelson and keel were both broken?

A. Yes, sir.

Redirect examination.

By Mr. HAGNER:

Q. Mr. Kensel, could anything except a rock or other obstruction at the bottom of the berth have caused the condition that vessel was in?

Mr. WILSON: Objected to as immaterial.

A. No, sir; it had to be something of that nature.

W. H. KENZEL.

Subscribed and sworn to before me this 1st day of February,  
A. D. 1894.

RUTLEDGE WILLSON,

*Special Commissioner.*

220 At the same time and place also appeared WILLIAM GOKEY,  
a witness produced on behalf of libellants, —, being first duly  
sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. Mr. Gokey, give your age, please.

A. Very near 60 years old—59.

Q. Your occupation, Mr. Gokey?

A. Shipwright.

Q. And your residence?

A. Brooklyn, New York.

Q. Did you know the schooner Ellen Tobin?

A. Yes, sir.

Q. What relations did you have with her, Mr. Gokey?

A. I have repaired her for the last ten or twelve years, with the  
exceptions of, I think, once or twice, every year.

Q. When was the last time you repaired her?

A. Two years last summer.

Q. Where did you have her then?

A. I had her at my dock.

Q. In Brooklyn?

A. In Brooklyn.

Q. What kind of repairs did you put on her at that time?

A. Between 13 and 14 hundred dollars' worth.

221 Q. Was she completely repaired at that time or not?

A. Yes, sir; she was thoroughly overhauled and repaired.

Q. She was a sound, staunch vessel when you put her off your  
ways at that time?

A. Yes, sir; I considered her such.

Q. Do you know whether or not she has always been kept up in  
good order?

A. Ever since I have known her she has been.

Q. And that has been about how many years?

A. 12 or 14 years.

Q. Are you or not familiar with the amount of cargo a vessel can carry above her tonnage rate?

A. I am.

Q. Why can a vessel carry more than her tonnage rate?

A. It is in the construction of a vessel. If she is built lean—what you call lean, sharp—her tonnage will exceed her carrying capacity, and if she is built flat, and the vessel has a centerboard in her and a trunk in her, her carrying capacity will double her tonnage.

Q. What is meant by the trunk; is that the same as the centerboard?

A. Yes, sir; the centerboard is inside of this trunk.

Q. That is the centerboard well?

A. Yes, sir.

Q. The trunk is the centerboard well?

A. Yes, sir.

Q. Do you know whether or not underwriters inspect vessels or whether they are insured or not?

222 A. Yes, sir.

Q. Do underwriters constantly come to your wharf?

A. They come to every vessel I take out.

Q. What is that, to your railroad or dry-dock?

A. It is a dry-dock.

Q. And that is irrespective of whether the vessel is rated or not?

A. It don't make any difference.

Q. What is the object of that?

A. That is because they insure the cargo whether the vessel is insured or not, and if they find they want recaulking and if the owners won't have it done they put a black mark on it, and when you go to insure the cargo they won't insure her.

Q. Insure what?

A. Won't insure the cargo of the vessel.

Mr. HAGNER: Look at that paper, please (handing witness Exhibit C to the libel, which witness examines). Were you or not one of the surveyors?

A. I was; I was on this survey.

Q. You were on this survey, a copy of which is Exhibit C to the libel that I have already called attention to?

A. Yes, sir.

Q. That survey is dated what time?

A. The 1st of November.

Q. 1893?

A. 1893.

Q. What condition did you find the Ellen Tobin in when you made that survey?

223 A. I went aboard of her and found her deck raised up three feet for about 40 feet.

Q. What was the condition of her decks otherwise; her upper decks?

A. Well, her upper deck was busted up and broken.

Q. Had there been any cutting in the upper deck at all?

A. I believe there had been some cutting in to take her cargo out or put in the pumps, or something like that.

Q. Could you tell at that time whether she had a cargo in her or whether she was empty?

A. I could tell she had a cargo in her by the stone or something I saw on the deck. I saw some on the decks that had been spilled.

Q. Was she full or empty when you saw her?

A. She was empty.

Q. Of her cargo?

A. Of her cargo.

Q. Could you or not see down into her, or how far could you see down?

A. I could see down to her middle deck—to her lower deck.

Q. Could you see down through the hatch to the lower deck?

A. I could see down through the hatches to the lower deck and could see the lower end of the trunk.

Q. You could see the lower end of the trunk?

A. Where it meets the timbers—the lining, I should say. I could see the timbers of the trunk and could see her middle deck.

Q. What was the condition of the trunk or centerboard well?

A. It was busted in the end of it, the planking ripped up and busted on the end of the well.

Q. How high was that raised?

A. Three feet, as well as I could judge.

224 Q. What did you consider her condition was at that time, her susceptibility of being repaired?

A. They way she was twisted and broken I did not think she was worth repairing.

Q. What would you have been willing to pay for her at that time?

Mr. BARNARD: I object to that as incompetent.

A. Nothing; I would want a thousand dollars to take her.

Q. You would have wanted a thousand dollars to have taken her?

A. Yes, sir.

Q. And done what to her?

A. Sir?

Q. You would have wanted a thousand dollars to have taken her and done what to her?

A. And done nothing to her.

Q. Would you have repaired her if she had been given to you?

A. No, sir; I would not.

Q. What would you have repaired her for if she had been given to you?

A. Well, it would cost more than the vessel was worth to have repaired her and make her seaworthy again.

Q. Did you notice how far the water was up in her?

A. Yes, sir.

Q. How far was it?

A. It was just come around her middle deck; it was at low water.

Q. It was at low water at that time?

A. Yes, sir.

Q. You are certain of that?

A. I am.

225 Q. Did you compare the water in the vessel with the water outside the vessel?

A. No more than looking at it.

Q. Did you observe whether the height of the water in the vessel kept pace with the water outside?

A. The water was the same inside as outside; it was the same after the tide raised.

Q. What would that indicate?

A. It showed that the bottom was broken and the tide ebbed and flowed in her.

Q. Was her upper deck above the water at the time you took the survey?

A. I think her upper deck was out at that time about three feet.

Q. Did you notice any peculiarity about her shrouds?

A. Yes, I did; they were parted and broken.

Q. When did you see the Ellen Tobin last prior to seeing her in Georgetown?

A. I haven't seen her since. Over in my yard I saw her before.

Q. How long ago was that?

A. Two years ago, I think, in August.

Q. Are you sufficiently familiar with vessels to be able to state the value of it?

A. I ought to be.

Q. You consider you are?

A. I owned in the neighborhood of forty.

Q. Will you tell me, Mr. Gokey, at the time you discharged the Ellen Tobin from your dry dock, what did you consider her to have been worth?

226 Mr. WILSON: I object to that as incompetent.

A. Ten thousand dollars.

Q. How did you consider the Ellen Tobin was built?

A. I considered she was built well and a strong-built vessel; she was a high-sided vessel and built strong.

Q. Would you have called her a lean vessel, or would you have called her a flat vessel?

A. I would have called her a flat vessel.

Q. Do you or not know whether the underwriters of her cargo had to pay any damages to any one for any injuries to her cargo?

A. I am in the vessel trade and never heard of her having any accidents, and if there are any accidents I always hear about them, because there are five or six of them at my place every day—in-spectors of vessels.

Q. Do you or not hear a great deal of vessel talk in your business?

Mr. WILSON: Objected to as immaterial.

A. I do hear a good deal of the talk.

Q. You talk a good deal of the vessels themselves?

A. I am a pretty heavy owner, like that, and I am in with one thing or another and hear a good deal about them; that is my business.

Q. If there were any injuries to freights during the last five years you would have known it?

A. Yes, sir; I would have known it.

227 Mr. WILSON: I object to the question as immaterial and leading.

Q. Take Exhibit C to the libel and state if the facts therein set forth by you as one of the surveyors are or are not true.

Mr. WILSON: The question is objected to as incompetent.

A. Yes, sir; they are true.

Cross-examination.

By Mr. WILSON:

Q. You mean to say it would have cost \$10,000 to repair the Ellen Tobin when you saw her?

A. I did not say she cost \$10,000.

Q. What do you think it would have cost to raise and repair her?

A. To put the vessel in good order as she was before I don't think it could be done for any less than \$10,000, and make her as seaworthy again.

Q. How much did you put as the cost of raising her?

A. I don't know. I don't have anything to do with that.

Q. Do you mean to say it would cost \$10,000 to raise and repair her?

A. Yes, sir; to raise and repair her; to repair her and put her in the same condition she was before she was sunk.

Q. Do you know what condition she was in when she sunk?

A. I don't know except the last time I saw her at my yard.

Q. How long ago was that?

A. A year ago last summer.

228 Q. What happened to her after that you don't know?

A. I do not.

Q. What do you base your valuation upon?

A. Upon the condition she was in.

WM. GOKEY.

Subscribed and sworn to before me this 1st day of February, A. D. 1894.

RUTLEDGE WILLSON,  
*Special Commissioner.*

At the same time and place and in the presence of the same counsel also appeared MAJOR D. TWIFORD, a witness produced on behalf of libellants, who, being first duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. What is your business, Mr. Twiford?

A. I am a waterman; that is my business.

Q. A seaman?

A. Yes, sir.

Q. How long have you been a seaman?

A. I have been a seaman thirty years. I was sailing 35 years. I didn't go to sea till I was sailing five years.

Q. Where were you in July or August, 1893?

A. On the schooner Ellen Tobin.

Q. How were you there engaged?

A. As first mate.

229 Q. How long were you there as first mate?

A. From the third of June until the vessel sunk.

Q. Where?

A. In Georgetown.

Q. Had you ever been in Georgetown with any vessel before you were there with the Ellen Tobin?

A. Yes, sir.

Q. When was that?

A. It was either in '58 or '9; I won't say which; somewhere about there.

Q. You haven't been there since '58 or '9, except with the Tobin?

A. No, sir.

Q. Where did you land then, Mate?

A. We landed a load of lumber out of a small schooner at Joseph Libbey's wharf.

Q. Where is that?

A. Just above Rock creek.

Q. Did you ever at any time land above the place of Libbey's in Georgetown?

A. No, sir.

Q. Were you or not familiar with the harbor of Georgetown above Libbey's wharf?

A. No, sir; not at all.

Q. Were you familiar with the dock at which the Tobin was sunk?

A. No, sir.

Q. Had you ever been there before?

A. No, sir.

Q. Before you took her up there?

A. No, sir.

230 Q. On the 2nd of August, 1893?

A. No, sir.

Q. Did you or not know there was a stone or any obstruction at the bottom of the berth in front of the stone crusher or elevator?

A. No, sir; I had no knowledge of it whatever.

Q. Had you any idea there was any stone there at the bottom of the berth?

A. No, sir.

Q. Will you tell us when you went to Georgetown with the Tobin that towed up to Georgetown on the 2d of August? Do you remember the day of the week?

A. It was Wednesday, sir. I suppose it was between three and four o'clock in the afternoon when we towed up there.

Q. When you got there?

A. When we got there; yes, sir.

Q. Where did you come from?

A. We came from Fort Washington.

Q. What was the condition of the Ellen Tobin while she was at Fort Washington?

A. In good condition.

Q. Was she staunch and strong?

A. Yes, sir.

Q. Was she leaky?

A. No, sir.

Q. Where were you first towed, Captain?

A. The tug took us to the soap factory wharf; maybe the second wharf above Mr. Smith's. I think it is a wharf or two above.

Q. That is where you lay?

A. Yes, sir.

231 Q. What did you do there?

A. We towed there, and we got out our lines enough to lay there all night.

Q. Did you expect to lay there all night that night?

A. Yes, sir; I expected so, but after we got there the captain went down to see the superintendent of the works.

Q. What for?

A. He went down to see when he could get to the dock, and he came back and told me—

Mr. WILSON: Don't state what he told you. I object to it as hearsay and incompetent.

Q. The captain came back and told you what?

A. He came back and told me the superintendent told him he could haul back that night and be ready to go to work the next morning.

Q. Well?

A. I got off her fastenings and run a line astern and hove back and made it fast to a lighter.

Q. How did you do that?

A. With a boat; a yawl. We borrowed a small boat or yawl from a small schooner. It was lying there loaded with rock ready to go, and we hove back.

Q. What did you fasten the lines to?

A. To the best of my judgment, we made her fast to a lighter. Then we hove back, and then we run another line and passed it to a gentleman named Mr.—I know his name if I can think  
232 of it.

Q. Would you know it if you heard it?



A. Yes, sir.

Q. Was it Mr. Godfrey?

A. Yes, sir; that is the gentleman. He made it fast to a pile on the wharf, somewhere near the little house, the engine-house, where they hoist for the crane.

Q. How much line had you out at that time?

A. I suppose the line—

Q. At the time you handed it to Mr. Godfrey?

A. I suppose we hauled out 20 fathoms.

Q. Did you hear any conversation between the captain and anybody?

A. Yes, sir.

Q. What was it and who was it with?

A. He asked a gentleman on the wharf how much water there was there.

Q. Who was the gentleman?

A. Well, I didn't know at that time, but I learned enough—

Q. Who was he?

A. Mr. Speaker, the superintendent of the wharf.

Q. What did he ask him?

A. He told him there was 15 feet of water there.

Q. Where was Mr. Speaker?

A. He was standing on the dock.

Q. Where on the dock?

A. Near the corner of the stone-crusher, the east corner. Near the east corner of the stone-crusher.

Q. What do you mean by the crusher? There is a crusher there and an elevator.

A. I mean the principal building.

233 Q. The elevator, you call it, then?

A. Well, either one.

Q. Was he standing by the stone-crusher proper or standing by the elevator?

A. He was not near the elevator. I call the elevator what you take the stone up with; I call that the elevator.

Q. Was he standing on the east or west of the building?

A. He was standing on the east of the building.

Q. East of the tall building?

A. East of the tall building.

Q. And the captain said what?

A. He said all right. I think that was the only conversation I paid any attention to.

Q. What were the exact words, as far as you can remember, of what the captain said to Mr. Speaker?

A. He said, How much water is there here at low water?

Q. And what was Mr. Speaker's reply?

A. Over 15 feet; and the captain said, All right.

Q. Did or not Mr. Speaker say anything more than that?

A. Not as I recollect. I was busy with the line.

Q. Did he say anything about danger there or about there being danger there?

Mr. WILSON: I object to the question as leading.

A. Not as I heard of.

Q. When was the loading begun?

A. The loading was commenced on Thursday morning between seven and eight o'clock.

234 Q. Well, did you have any conversation yourself with Mr. Speaker?

A. Yes, sir.

Q. When was that?

A. That was before noon Thursday; I would not say the hour, but it was some time before noon.

Q. What was it?

A. I asked him how much the tide rose and fell, and he said from three to three and a half feet. I also asked him how much water there was there at low water, and he says, There is plenty of water for you. He said, I have loaded vessels carrying 700 ton- and went away without touching.

Q. What did you say to that?

A. I said, That might be and not draw as much water as we do when we are loaded; and he said, How much do you draw? and I said, 14½ feet; and he said, There is 15 feet; and I said, If that is so, it is enough for us. That is the extent of the conversation as far as I remember.

Mr. WILSON: Note an objection to the question and answer on the ground that there was no authority shown to be given Mr. Speaker for the representations made by him.

Q. Did he say anything about the berth or the condition of the berth?

A. Yes, sir.

Q. What did he say?

235 A. He said it had been dredged out; he says this spring, and it was dredged out for 15 feet of water at low water; but he says, Up there under those chutes where the dredge could not work they did not dredge there; and he says, We always keep a lighter there and you don't have to lay there, only under the long chute. I says, If it is dredged out under the long chute, it don't matter whether it was dredged or not there.

Q. What time did you quit work Thursday?

A. I guess it was about 6 o'clock in the afternoon.

Q. What then? Did you work Friday?

A. Yes, sir. We resumed work Friday morning.

Q. What time?

A. At 7 o'clock.

Q. How long did you keep working?

A. Till noon.

Q. Then what did you do?

A. We knocked off till one o'clock, and then went to work till a few minutes after two, and hauled the vessel astern to enable us to work in the forward hatch.

Q. What were you to work in the forward hatch.

A. To work the chute, the same as we worked in the aft-hatch.

Q. You say you hauled the vessel astern?

A. Yes, sir.

Q. Go ahead. What did you do then.

A. We made the vessel fast in the proper place to work the chute in the forward hatch, and then Mr. Speaker says, He will have to move this spar—this pole; that we had to breast the vessel off from the wharf when we hauled the vessel astern, and the  
236 end of the pole that was on the vessel stayed there, and the end on the wharf stood off cat-a-corner, and then he says, We will have to move the end of that pole on the wharf further off and put it abreast; which we did, and put a tackle into it and breasted her off.

Q. Where were you standing when Mr. Speaker said that?

A. I was standing on the forward part of the deck with Mr. Speaker.

Q. Mr. Speaker was on the deck with you?

A. Mr. Speaker was on the deck with me.

Q. Forward?

A. Yes, sir.

Q. You did that?

A. Yes, sir.

Q. Then what happened?

A. Then I proposed to Mr. Speaker to go aft with me and sound to see how much water there was, because the captain asked me to sound the depth of the water if we hauled astern. I did so. I found about  $13\frac{1}{2}$  feet of water on the inshore quarter. And about half way between the davits and the rudder I sounded again, and I found about  $14\frac{1}{2}$  feet; well, between 14 feet and a little over; 14 feet to  $14\frac{1}{2}$ . Then I also took the lead abreast of her aft hatch and sounded there, and there was about fifteen feet. That was on the inshore side.

Q. On the inshore side?

A. Yes, sir.

Q. Where was this pole when Mr. Speaker and you were standing at the bow; where was the vessel end of the pole?

A. Aft of the forward rigging.

Q. How far aft of the forward rigging?

A. About four feet.

237 Q. Where was the shore end of the pole when you and Mr. Speaker were standing there at the bow of the vessel?

A. The shore end, it was against a bank to the westward of the fence that was westward of the elevator.

Q. West of a fence that was west of the elevator?

A. Yes, sir.

Q. How was the pole fastened to the schooner?

A. It was fastened with a tackle.

Q. Fastened with a tackle?

A. Yes, sir, and hauled off with a tackle lashed down. We lashed down the line to a bitt after we hauled her off.

Q. Lashed down to the bitt?

A. Yes, sir.

Q. Where was the bitt?

A. Near the rail near the forerigging.

Q. What was the tackle fastened — besides the pole?

A. Well, we had a strap around the pole—one end of the pole, and a strap around it.

Q. What tackle was it?

A. It was a watch or deck tackle.

Q. What was the tackle fastened to?

A. The tackle is double block and single block with  $2\frac{1}{2}$  rope rove through it, then a strap around the pole, the double block hooked into the end of the strap and the single block hooked into another strap around the bitt. We hauled the vessel off a sufficient distance to enable the lighters to pass between the vessel and the dock and there lashed. Then Mr. Speaker says, I will send up the river  
238 and get another pole to keep her breasted off aft with. I will send tonight, I think the word was. I know he said he would send up the river to get another pole to breast her off with aft.

Q. How was the pole fastened when it was carried aft?

A. We didn't carry that pole aft.

Q. You didn't carry that aft at all?

A. No, sir; we moved the shore end of it—that same pole, we moved the shore end of it aft and made it fast with a line to a—I suppose it was a part of the building. It was a square pile—I suppose it was a part of the building—and the end was fastened to that to keep it from slipping.

Q. You say you sounded first and found  $13\frac{1}{2}$  feet on the inshore; did you say that?

A. The inshore quarter.

Q. The inshore quarter?

A. Yes, sir.

Q. About how far was it from where you dropped the lead to the long chute?

A. It was probably 80 feet.

Q. After you sounded and found 15 feet, you say, on the inshore side, did Mr. Speaker say anything about the condition of the water?

A. Yes, sir.

Q. What did he say?

A. He said the water was deeper further ahead.

Q. Deeper further ahead. That would be west or east?

A. Further up the river. He also said, You will have to haul ahead to load aft and that will put you in plenty of water.

239 Q. What did you do then?

A. I told him all right, then, as I had made my arrangements to go home. I believe we were about to quit then, and I told Mr. Speaker in case there was anything to do about the vessel the men were there, and to call on them to do anything he wanted.

Q. What did you do then?

A. I went home.

Q. Where is your home?

A. In Baltimore.

Q. Had you any regular times for trying the pumps on board of your vessel, the Tobin?

A. Yes, sir.

Q. What were those times?

A. Morning and evening or night and morning.

Q. Was that the invariable custom?

A. Well, that is my custom.

Mr. WILSON: I object to that as leading and incompetent.

Q. You always did that?

A. Yes, sir; we always did that.

Mr. WILSON: I object to that question as a repetition.

Q. Do you know what the condition of the Ellen Tobin was prior to the accident?

A. Good.

Q. What was her condition as to soundness?

A. She was sound.

Q. What was her condition as to dryness or wetness?

240 A. Her character?

Q. Inside her hold?

A. She was as dry as—I would not say a powder-house, but she was as dry as any vessel generally is. Of course, there is some dampness about all vessels. There was no dampness about her. We discharged a load of cement down at Fort Washington, and they said there it was in the best condition of any load of cement they ever had landed there.

Q. Did you have any accident to the body of the vessel—the Ellen Tobin—at any time while you were aboard of her as mate?

A. No, sir.

Q. Did you have any accident to the boom of the vessel—the Ellen Tobin—coming up the river?

A. Yes, sir.

Q. How did it happen?

A. Well, we anchored one time in a rain squall or a wind squall, as I believe there was more wind than rain. It struck us with the sails on her.

Q. Where was that?

A. It was off Naremoey creek. Her port boom-tackle was made fast and held the moom on the port side of the vessel. It pitched into us pretty heavy and the falls of the crotch-tackle slipped, the boom went over, and cracked the boom right in the strop.

Q. Where?

A. In the strop.

Q. Do you know of any other accident whatever that occurred to the body of the vessel—the Ellen Tobin—or to any of her rigging at any time from the time you first went on her to the time  
241 of the injury at the dock?

A. No, sir.

Q. None other?

A. No, sir.

Q. You say that Mr. Speaker told you that the dredge had not dredged out under those chutes?

A. The small chutes.

Q. The small chutes?

A. Yes, sir.

Q. Where are they?

A. They are small chutes that project from the elevator that run the dust and small stone down to the lighters.

Cross-examination.

By Mr. WILSON:

Q. What time did you go home?

A. I guess it lacked about a quarter of 3; I don't exactly know when I left the vessel.

Q. What day?

A. Thursday.

Q. Thursday?

A. It was on Friday. I made a mistake about the day.

Q. When did you come back?

A. I came back Monday morning.

Q. What time?

A. I was at the vessel five minutes past eight.

242 Q. Who did you see first when you got back?

A. The first man I saw on the vessel was the steward.

Q. Where was the vessel then?

A. She was lying precisely where I left her, full of water.

Q. Just where you left her?

A. Yes, sir.

Q. How much of her was visible above water?

A. Well, I suppose, maybe her deck at that time was a foot and a half above the water—her upper deck. I said full; she was full inside. The water was as high inside as it was out.

Q. On what day and hour was it that you made the soundings off the vessel?

A. That was Friday, sir.

Q. That was on Friday?

A. It was Friday. The same day I went away. I suppose it was about half past two o'clock.

Q. Who helped you to make the soundings?

A. Mr. Speaker was standing beside me while I was making the soundings with the lead-line. I made three soundings and he said it was not worth while to make any more, as there was more water above.

Q. Were the soundings inside?

A. On the starboard, between the vessel and the wharf.

Q. Between the vessel and the wharf?

A. Yes, sir.

Q. Between the vessel and the scow?

243 A. There was no scow there at that time, because they had taken her out; it was between the vessel and the wharf.

Q. Friday afternoon when you made those soundings there was no scow there at all?

A. I won't be positive of that. If there was a scow——

Q. What I asked you was, when you made the soundings, if there was a scow between the vessel and the wharf?

A. Yes, sir; there was one.

Q. Did you make the soundings between the vessel and the scow?

A. No, sir.

Q. You didn't make any soundings between the vessel and the scow?

A. The scow that was there was lying forward of where I made the soundings. I think they had hauled the light scow out, and they were unloading the scow, or ready to unload, forward.

Q. Where did you make the first soundings?

A. Aft.

Q. Whereabouts?

A. I suppose it was about 80 feet from the chute.

Q. How far from the stern?

A. I will say from six to eight feet.

Q. From six to eight feet from the stern?

A. Yes, sir.

Q. Well, where you made the first sounding, was there anything between the vessel and the wharf?

A. I don't think there was, to the best of my judgment.

Q. And what was the depth you found there?

A.  $13\frac{1}{2}$  feet.

Q.  $13\frac{1}{2}$  feet?

A. Yes, sir.

244 Q. Where did you make the second sounding?

A. Right over the taffrail.

Q. How far from the stern?

A. How far from the stern?

Q. Yes.

A. It was precisely right at the stern. The taffrail is what we call the stern of the vessel—the yawl-boat at the davits. I dropped the lead between the yawl-boat and the taffrail.

Q. The second sounding was at the stern?

A. Yes, sir.

Q. What depth did you find there?

A. 14 feet.

Q. And how far was the stern from the wharf?

A. The stern was, I guess, about 22 feet from the wharf, right at that place.

Q. Was there any scow between the vessel and the wharf right at that place?

A. That is just what I told you I cannot recollect.

Q. You cannot recollect that?

A. I cannot recollect whether there was or not.

Q. Where did you make the third sounding?



A. The third sounding was right abreast of the aft hatch, which I suppose was about 40 feet from the chute.

Q. How far was that from the stern?

A. I suppose it was about 50 feet from the taffrail.

Q. How much water did you find there?

A. Fifteen feet.

245 Q. Fifteen feet?

A. Yes, sir.

Q. At that point was there anything between the vessel and the wharf?

A. That is just the question you asked me before that I cannot recollect.

Q. I asked you three times.

A. You asked me and I will answer to the best of my recollection.

Q. I will ask you again whether there was anything, according to your recollection, between the point where you made the sounding the last time and the wharf.

A. I don't recollect whether there was a lighter there or not.

Q. How far was it from the place where you made the last sounding to the edge of the wharf?

A. From 20 to 22 feet.

Q. Then you stopped?

A. Yes, sir.

Q. And you made no more soundings?

A. I made no more soundings.

Q. Did you ever sound on the outside?

A. No, sir.

Q. Never?

A. No, sir.

Q. Did you ever see the captain sound on the outside?

A. No, sir.

Q. Since you went there?

A. No, sir.

246 Q. And the soundings you made were the only soundings you know of being made when you got there?

A. Yes, sir.

Redirect examination.

By Mr. HAGNER:

Q. You said you did not sound after those three soundings?

A. No, sir.

Q. Why didn't you sound after those three soundings?

A. Mr. Speaker says, You need not sound any more. There is plenty of water forward where you are to haul your vessel.

Recross-examination.

By Mr. WILSON:

Q. How long had you been on the Tobin at the time she sunk?

A. I shipped on the 3rd of June.

Q. Where?

A. In Baltimore.

Q. Where was she lying there?

A. At Hamilton's coal dock.

Q. Was she taking on or putting off cargo?

A. She was ready loaded.

Q. Loaded when you went on board?

A. Yes, sir.

Q. That is the first time you ever saw her?

A. That is the first time I ever saw her, and the first time I ever saw Captain Hankins was that afternoon when I went there.

Q. How long were you there in Baltimore?

A. That was Saturday. I had just arrived from the  
247 Bahamas on that afternoon with a load of fruit.

(By Mr. HAGNER:)

Q. What is your place of residence?

A. 15 E. Lanvale St.

(By Mr. WILSON:)

Q. How many barrels of cement did you carry to Fort Washington?

A. It was thirty-two hundred odd; I don't recollect now.

Q. Did you have a full cargo?

A. No, sir.

Q. How many barrels of cement could she carry?

A. I guess she could carry thirty six or eight hundred barrels.

Q. How much water did she draw with those 3,200 barrels?

A. She drew about  $12\frac{1}{2}$  feet. I guess it was about  $12\frac{1}{2}$  feet. They would not allow but 12 feet at Round Out creek.

(Mr. HAGNER:)

Q. North river?

A. Yes, sir.

(Mr. HAGNER:)

Q. That is where you loaded?

A. Yes, sir.

Q. How much water did the schooner draw when you went home on Saturday afternoon?

A. She was drawing 13 feet of water aft, sir.

Q. And how much forward?

A. I guess she was drawing about  $7\frac{1}{2}$  to 8 feet. I didn't notice forward. I know she was out of the water. She didn't draw as much as when she had nothing in her.

Q. You didn't notice forward?

A. No, sir.

Q. Aft?

A. Yes; I did aft. She was drawing thirteen feet.  
248 Q. 13 feet aft and  $7\frac{1}{2}$  feet forward?

A. Yes, sir; I would not say forward. I didn't notice forward.

Q. When you left she was being loaded aft ?

A. No, sir.

Q. When did they begin to load in the forward hatch ?

A. They begun to load there, I suppose it was, after half past two on Friday afternoon.

Q. Before you left ?

A. Yes, sir ; before I left.

Q. How long was she loading in the forward hatch before you left ?

A. Probably 15 or 20 minutes.

Q. What would be the effect of loading in the forward hatch ; would it have any effect on the stern ?

A. Yes, sir.

Q. What ?

A. Her stern would come out a little ?

Q. How much ?

— — —  
Mr. HAGNER : In 20 minutes, Mate ?

A. I didn't mean that. If I said that, I didn't mean it. I said she would come out aft in loading the vessel forward.

Q. Suppose she had been loaded in the forward hatch and then she was loaded aft with the same quantity of stone, what effect would that have ?

A. Then she would have drawn as much water forward as aft.

Q. Do you know whether the vessel's position was changed after you left ?

A. I did not.

Q. Was she changed ?

A. Not as I know.

249 Q. Was it in the same position it was when you got back ?

A. It was not.

Q. What was the difference ?

A. She was afloat, loading her when I left, and when I came back she was in the bottom.

Q. Where she was lying, with reference to the wharf ?

A. In the position she lay, she was as nigh the position when I came back as when I left.

Mr. HAGNER : I object to the repetition of this question for this reason : If Mr. Wilson meanr the same position between the zenith and the downstairs (the naeder), it means one thing. If he means north and south, it means another thing. If he means east and west, it means another thing. If he will be kind enough to put his question so it will be understood, there will be no trouble about it.

Mr. WILSON : I object to Mr. Hagner's remarks on the question.

The WITNESS : That question has two sides to it.

Mr. WILSON : Give us both sides.

A. The question is whether the vessel moved up or down the river, or from the wharf or not. The second question is whether there was any more stuff put in, and whether she was loaded or

unloaded. I have answered both questions. I said she was as nigh the position she was when I went away as when I came back, in reference to the vessel being made fast.

Q. In reference to the wharf?

A. Yes, sir.

250 Mr. WILSON: Which was the question when Mr. Hagner commenced his long argument.

Mr. HAGNER: And before Mr. Wilson repeated his question three times.

MAJOR D. TWIFORD.

Subscribed and sworn to before me this 3 day of February, A. D. 1894.

RUTLEDGE WILLSON,  
*Special Comm'r.*

Also appeared JOHN HANKINS, a witness produced previously on behalf of the libellants, who, having been again duly sworn and cautioned, was further cross-examined.

By Mr. WILSON:

Q. I want to ask you to whom you were consigned in Baltimore on your last trip to Baltimore?

A. I was not consigned to any one in Baltimore. I didn't take any load there, but I was loaded, bound north, when the mate came aboard.

Q. To whom did you report there?

A. Where?

Q. In Baltimore. To any broker?

A. No one but George W. Jones.

Q. Whose name you have already given?

A. Yes, sir.

JOHN HANKINS.

Subscribed and sworn to before me this 3 day of February, A. D. 1894.

RUTLEDGE WILLSON,  
*Special Comm'r.*

251 FEBRUARY 6TH, 1893—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same counsel as before, and WALTER D. NARAMORE, a witness produced by the libellants, being duly sworn, testified as follows:

By Mr. HAGNER:

Q. State your name, age, residence, and occupation.

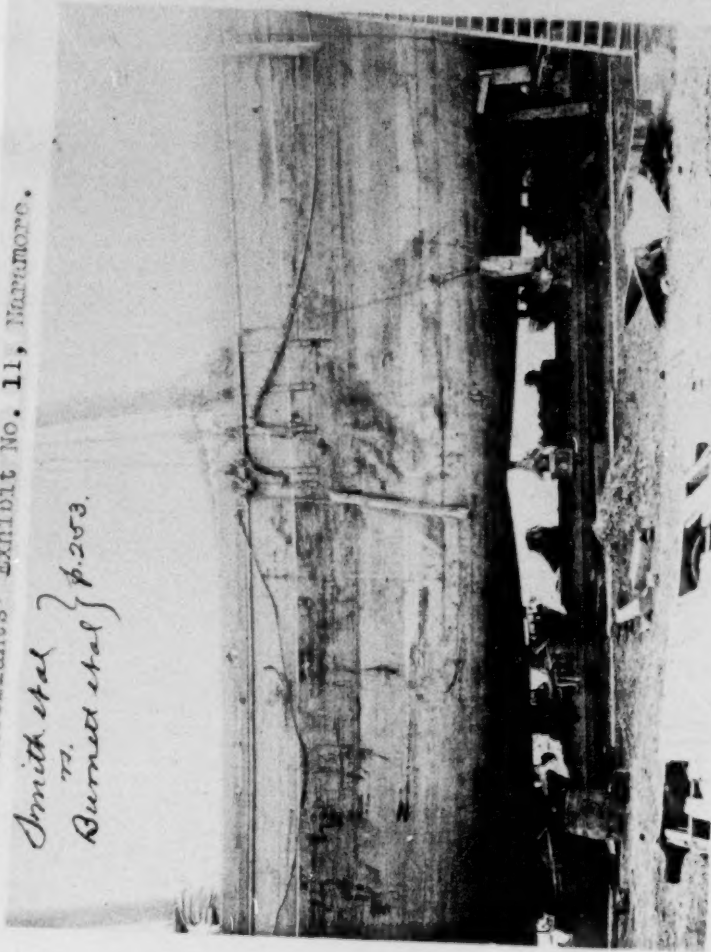
A. Age, 19; residence, #321 King St., Alexandria, Va.; occupation, photographer.

Q. Mr. Naramore, just state what that picture is you have there (indicating).



Libellants' Exhibit No. 11, Baltimore.

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A. This is a picture of a vessel. Mr. Hagner came up to our studio on the 1st day of February and asked us to go down and make a picture of the vessel that lay at Agnew's wharf. I went down and made this picture, 65 feet from the vessel.

Q. And in what direction from the vessel?

A. It was north of the vessel.

Q. I mean by that was it straight off in a perpendicular line from the middle of the vessel?

A. Yes, sir; it was straight, perfectly straight, off.

Q. Did you measure?

A. Yes, sir.

Q. How did you measure?

A. I took a rule and measured a long iron bar; I don't remember the length of that, but we got the measurement from that bar, which figured up to be 65 feet.

252 Mr. HAGNER: I offer this photograph in evidence, to be marked "Libellants' Exhibit No. 11, Naramore."

W. D. NARAMORE.

Subscribed to and sworn before me this 17 day of February, 1894.

RUTLEDGE WILLSON,

*Special Commissioner.*

(Here follows exhibit marked p. 253.)

254 At the same time and place also appeared JOHN B. LORD a witness produced by the libellants, —, being duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. What is your business, Mr. Lord?

A. I am engaged in the sand and gravel business.

Q. Where do you live?

A. I live on Bunker Hill road.

Q. Doing business here in Washington?

A. Yes, sir.

Q. What was your first connection with the schooner Ellen Tobin, if anything, Mr. Lord?

A. My first connection with the Ellen Tobin was a contract to remove the stones from her for the sum of \$800.

Q. Look at Exhibit No. 2 to the testimony in this libel and say of that is the contract of which you speak. Is that your signature?

A. That is my signature.

Q. And just below it is another paper cancelling the above contract. Is that your signature too?

A. That is my signature.

Q. And that is the first contract you entered into (indicating)?

A. Yes; that is the first contract.

Q. How long did you work on the vessel under this contract, Mr. Lord?



A. I was there for four or five days, as well as I remember. I did not take any account of it. I was there long enough to know that I was not going to get much out of it.

255 Q. And then you threw up the contract?

A. And I threw up the contract.

Q. Now, Mr. Lord, look at Exhibit No. 3, Hankins, to the testimony an- state what that is.

A. That is the contract for \$1,200. That is my signature.

Q. That is your signature on the back of that paper?

A. Yes, sir.

Q. What did you do under that contract?

A. Under that contract I finished it.

Q. What did you do—how did you finish it?

A. I pumped the stone out of it.

Q. What was the size of that stone, Mr. Lord?

A. I suppose that was stone that would go through a two-inch ring. You know more about it than I do, Mr. Smith (turning to him). They have a size to go through a certain sized ring.

Q. Mr. Lord, you will find on that contract there a lead-pencil mark, changing it from two weeks to three weeks.

A. From two weeks to three weeks.

Q. Do you remember how that got there?

A. I was dubious of getting it done in that time and asked for further time.

Q. Who was present when you asked for that time?

A. I believe the captain and yourself.

Q. And at whose instance was that lead-pencil mark of three put in there?

A. It was put there at my request. It was done to extend the time.

Q. You were paid how much for that, Mr. Lord?

A. Twelve hundred dollars.

256 Q. Did you receive the money?

A. I received a check and got the money on it; the check was good.

Q. Do you remember the gentleman whose check it was?

A. Mr. Endicott's. I placed it in the bank for collection and found out that the money was there to my credit.

Q. At the time you made those two contracts did you know of any bids having been made for raising the vessel for 8 thousand dollars?

A. I did not at the time; not until after I made the contract. I found out afterwards. I was only sorry I did not know it before.

Q. Why?

A. I thought I would get more for the job.

Q. Was the money which you got or which you agreed to pump that stone out for a moderate sum, a large sum, or a small sum for the work done?

Mr. WILSON: Objected to as incompetent and leading.

A. Well, I think it was a very moderate sum for the work done, under the circumstances; there was no one else in the town whom could have done it; there was no one fixed for the job. I consulted with my sons about that; after I had thrown up the first contract I consulted with my sons and they wanted me to charge \$1,500, and I said I didn't propose to rob you, as I thought my bid was high enough, but I found out they were right afterwards, and if I had put it at \$1,500 I would not have got too much for the job.

Q. Mr. Lord, how high does the tide rise here in the District of Columbia—average tide?

A. It varies. The tide rises from two and a half to three, from that to three and a half and sometimes to four feet. Two and  
257 a half they call the neap tide. The boatmen call it that because sometimes when they want to get away if they catch the neap tide they have got to stay there.

Q. Did you purchase the Ellen Tobin?

A. I did.

Q. What did you pay for it?

A. One hundred dollars.

Q. (Handing witness paper.) Look at that paper, Mr. Lord, and see what it is.

A. That is a bond given by myself to raise the Ellen Tobin in thirty days for \$5,000.

Q. The sureties are who; their names?

A. William Lord and William B. Lord.

Mr. HAGNER: I offer this paper in evidence, to be marked "Libellants' Exhibit No. 12, Lord."

Mr. WILSON: I object to that as incompetent and immaterial.

"LIBELLANTS' EXHIBIT NO. 12, LORD."

Know all men by these presents that we, John B. Lord, William Lord, and William B. Lord, all of the city of Washington, in the District of Columbia, and our heirs, executors, and administrators are jointly, severally, and firmly bound *firmly* by these presents unto Charles G. Endicott, managing owner, and the other owner of the schooner "Ellen Tobin" in the full sum of five thousand dollars (\$5,000), current money of the United States, and their and each of their heirs, executors, administrators, and assigns.

Now, the condition of the above obligation is such that if the said John B. Lord shall promptly raise said schooner Ellen Tobin  
258 and remove her from navigable water and away from the berth where she now lies sunk on a rock or other obstruction therein within the period of thirty days from this day, time being hereby made the essence of this bond, then this bond to be void; otherwise to be and remain in full force and effect.

Sealed with our seals this fifteenth day of November, A. D. 1893.

(1) JOHN B. LORD.	[SEAL.]
(2) WM. LORD.	[SEAL.]
(3) WILLIAM B. LORD.	[SEAL.]

Signed, sealed, and delivered in presence of—

C. E. TANFORD.

Q. When did you give that bond, Mr. Lord? I don't mean what time it was. I don't mean the date of it, as that speaks for itself, but in regard to the purchase of the schooner.

A. I gave that bond before buying the schooner.

Q. You have stated the price you gave for it, one hundred dollars?

A. One hundred dollars.

Q. Where is the schooner now?

A. Where is the schooner now?

Q. Yes.

A. She is on Agnew's ways.

Q. Railways?

A. Yes; railway.

Q. In Alexandria?

A. In Alexandria.

Q. How many times did you pump her out between the time you first took hold of her and when on the rock in Georgetown and the time you got her on the ways?

A. Four times, sir.

Q. Where was she at those four times when you pumped her out?

259 A. First when she was on the rock, and then at Analostan island. After I pumped her out the first time I run her to Analostan island to keep clear of the \$5,000 bond and let her fill.

Q. How long did she lie there?

A. Several days.

Q. And then where did you take her?

A. Then I took her down to the mouth of the sewer.

Q. Foot of what street?

A. Foot of Seventeenth street.

Q. Then what happened to her?

A. Well, while waiting for the tide there, there was a strong northeast wind struck us and the boys got afloat. As she went up the stream she wanted to get on the rock again, I suppose. They stopped her on the middle ground where there was no deep water, and there we let her lay and fill again.

Q. Then what did you do with her?

A. From there I took her to Alexandria.

Q. Then what did you do with her?

A. There wasn't water enough to take her on the ways, and then I had to take her on a shoal and let her lay again.

Q. Did she fill again or not?

A. Then she filled again.

Q. Then what?

A. Then we got a good high tide and got ready to take her on the ways. We pumped her out and put her on the ways.

Q. How long did it take her to fill, Mr. Lord?

260 A. It took her a good long time to fill the last time we took her out. When we first pumped her out she leaked very bad, but I kept a man down her well hole chunking her up till we had her under pretty good control.

Q. How long did it take her to fill over on Analostan island when you had her on the flats?

A. In regard to time, I never timed her at all. My boys could tell; I don't know the exact time.

Q. Do you know about her filling at the sewer at the foot of Seventeenth street, how long it took her then?

A. No; I do not. I will say this: we had her so under control that we could pump her out with the centrifugal pump very handily after I got her chinked up good.

Q. What were the necessary implements with which you had to work in pumping the stone out?

A. A centrifugal pump.

Q. Are there any more of those around Washington?

A. I don't think there is another one in Washington.

Q. Do you know whether there was one in Baltimore?

A. I don't think there are any in Baltimore.

Q. Do you know whether there are any around this part of the country except yours?

A. I don't know, but I don't think there are.

Q. What was her condition when you put her on the ways, Mr. Lord?

A. She had a pretty bad dent up in her.

Q. Where was that dent?

A. That dent was along about the center of her, I think.

Q. What sort of an impression was there? Describe the dent.

261 A. The dent had pushed her keel and center well right up, I suppose, two feet or more; the whole dent of the rock was right on her and had broke the keel and center well.

Q. What was the condition of her keelsoo?

A. That was broken; all pushed right up.

Q. You already mentioned the keel?

A. Yes, sir.

Q. How wide was that dent, Mr. Lord, across the vessel?

A. That dent was fifteen to sixteen feet wide; I never measured it.

Q. That was as near as you could judge?

A. Yes, sir; as near as I could judge.

Q. Did you attempt to repair her, Mr. Lord, as far as to get bids for her repairs?

A. I got two bids on her. I went over to Baltimore and got a gentleman to come on from Baltimore; I forget what his name was. He came down—

Q. Would you know if I mentioned it? Brewster—is that it?

A. That is it. (Continuing.) He came down and gave me a bid of \$5,650; that was to repair her and paint her, without rigging.

Q. Without rigging?

A. Without rigging her; just repairing of her and painting.

Mr. WILSON: I object to the question and answer as immaterial.

(Mr. WILSON:)

Q. Was there any writing?

The WITNESS: There was no writing. Then I had a bid from parties down in Alexandria.

Q. For how much?

262 A. \$4,500.

(Mr. WILSON:)

Q. Was that in writing?

The WITNESS: That was not in writing either. I should have had it put in writing if I came to the conclusion to have it done, but it was striking too high figures for me.

Q. What did that bid cover?

A. That bid just simply covered the repairing.

Q. What was it?

A. Forty-five hundred dollars.

Q. For the repairing of the vessel without any painting or rigging?

A. No rigging; and that party told me I had better——

Mr. WILSON: I note an objection to his stating what was told him as being hearsay.

The WITNESS (continuing): I would have been better off to take those parties' bid and let them go on with the job, as I think they would have had a good many extras on them.

Q. How was the vessel built?

A. I will state the Brewster man in Baltimore told me that it was the best built vessel he ever saw.

Mr. WILSON: I object to that as incompetent.

Q. Do you know anything about vessels yourself?

A. I know a good boat.

Q. What did you think of her?

A. I think she was built substantially; she was well built.

Q. Do you own the Tobin still?

A. No, sir.

263 Q. What did you do with her?

A. I traded her off for a tugboat called the "Spray."

Q. Who did you trade with?

A. I traded with Mr. Agnew.

Q. Do you know when you traded what he charged for the Spray?

Mr. WILSON: I object to that as incompetent and immaterial.

A. His man told me he had refused \$3,000 for her last year.

Q. What did he say they held her at?

A. I didn't ask what he held her at.

Q. What did you give for the Spray?

A. I paid \$1,500 cash; gave my check for \$1,500 difference between the Spray and the vessel.

Q. You then gave the vessel——

A. And fifteen hundred dollars.

Q. Cash?

A. Cash.

Q. For the tug Spray?

A. For the tug Spray.

Q. When the vessel was lying sunk at the wharf, Mr. Lord, did you see other vessels being loaded outside of her?

A. Outside of her?

Q. Yes.

A. Not as I saw.

Q. Were they bringing stone at all to the wharf while you were there?

A. They were unloading stone between the Ellen Tobin and the wharf—Smith's; stone boats would come in and unload.

Q. What kind of boats?

A. Scows.

264 Q. What else would you call them?

A. Scows—that is what I call them.

Q. Did you see them bring in any large stone in there, or was it all this crushed stone?

A. I saw a boat with large stone at the crusher. I saw a large boat loading with very heavy stone.

Q. Where was that stone put?

A. That stone was taken off the wharf and put on this boat; put on Gray's scow. I saw them loading there with stone.

Q. Did you see any stones broken up there on the wharf proper?

A. I saw some blasted on the wharf.

Q. Could you tell from the appearance of the Tobin what her condition was irrespective of the injury—the impression of that rock?

A. You mean after she was taken out?

Q. On the ways.

A. I think her condition was very good except the place where the rock—she had drawn some of the butts open, but so far as the seams were concerned they seemed to be all tight.

Q. What was the condition of her bottom?

A. The bottom was all in good condition except where the rock was.

Q. What did you say the condition of the bottom was?

A. I should judge she had had an elegant bottom on her; any one could see that.

Q. As you pumped her out several times, could you tell whether she leaked in her seam joints?

A. I could not tell from pumping her out, but I could tell from being on the ways that very few of her joints were leaking. It was only those that were strained from lying on the rock, or  
265 whatever substance it was. I judge it was pretty hard.

Q. Did you buy anything else belonging to the Tobin, Mr. Lord?

A. Yes; I bought two fog horns, compass, two lounges—I think there were two—and two side lights. Compass—I think I said

that—and I think her log and several other papers—maps, I think, or charts.

Q. What do you call those things belonging to a vessel?

A. I suppose it was her furniture.

Q. What did you pay for them?

A. \$30.

Q. That is in addition—

A. In addition to the \$100. \$130 all together, I paid. They were bought separate.

Q. At the same time you bought that or subsequent?

A. After I bought the vessel.

Q. In regard to the condition of the stone in her, Mr. Lord, when you went there to pump her out, did you see how high the stone came up in her?

A. The stone came pretty well up to the second deck, I think it was, and there was some few stone on the second deck.

Q. By the second deck, what deck do you mean, the lower or the upper deck?

A. The lower deck.

Q. That was the lower deck?

A. The second deck from the top; yes, sir.

266 Q. The lower deck?

A. The lower deck.

Q. Was there any stone on the lower deck?

A. Some few, very few, which dropped on there from loading.

Q. Well, did she appear to have been loaded on her lower deck?

A. So far as I could see she looked like she was. I could not see under her, but the stone was up in the two hatches, and I couldn't see how much she had down under.

Q. Did you pump *pump* above the second deck at all?

A. No; I didn't pump any stone on the second deck.

Q. All the stone you pumped out was in the hold?

A. Yes, sir; in the hold.

Q. Below her decks?

A. Yes, sir; below her decks.

Q. Below all of her decks?

A. Below all of her decks; yes, sir.

Q. Have you received the deeds, Mr. Lord, for the vessel?

A. I have not received them.

Cross-examination.

By Mr. WILSON:

Q. Mr. Lord, when did you pay the \$100?

A. I paid it on the morning I bought her.

Q. What date was that?

A. That I don't know, what date.

267 Q. About?

A. I didn't charge my memory at all about that.

Q. What month?

A. I beclare, it has been so long I have forgotten it. I have a



pretty bad memory unless I charge my memory, but I can get the date very handy. I gave a check for it—for the amount—and, of course, I have my checks from the bank.

Q. To whom did you pay the hundred dollars in the check?

A. I drew that in favor of Mr. Endicott, or some such name as that.

Q. Have you had any transactions with Mr. Endicott since that?

A. No, sir.

Q. You didn't get any bill of sale or any kind of conveyance?

A. I have. He sent those on to me, but they are still here in Mr. Hagner's office. They were bills of sale from different—there seems to me there were quite a number of owners of the vessel, and he had quite a good deal of trouble.

Q. To you?

A. I haven't them in my possession. Mr. Hagner has them.

Q. To whom was the bill of sale made?

A. John B. Lord.

Mr. WILSON: I would like to see them, Mr. Hagner.

The WITNESS: I ought to take those to the custom-house and have a regular bill of sale made in favor of Mr. Agnew. They properly belong to him. He is the proper one to have them.

Q. Did you make a bill of sale to Mr. Agnew?

A. No; I have not, on account of getting those papers.

Q. When did you first see the Ellen Tobin after she was sunk?

268 A. That is something I haven't charged my memory with.

Q. When did you first get to work on her?

A. I could not tell without referring to my papers.

Q. How long did you work at her after you first began?

A. I think from the first to the last—

Q. I mean after you first began how long did you continue?

A. You mean from the time I commenced first until I finished it?

Q. No; not until you finished it.

A. I think it was four or five days. I won't be certain about that.

Q. Under your first contract?

A. Under my first contract. I won't be certain about that. I am pretty careful what I say, because I have a terrible bad memory and I didn't charge my memory with those things at all.

Q. What implements did you have to do the work under the first contract?

A. I had a centrifugal pump and dredge for dredging sand. I didn't know at the time she would dredge stone, but finally I found out she would.

Q. You worked four or five days and the contract was abandoned?

A. Yes, sir.

Q. When did you begin under the second contract?

A. I think it was some two or three weeks before I started again, if my memory serves me right.

Q. Under the new contract?

A. Under the new contract. I went off down the river. I went down to Occoquan and dug sand between the times.

Q. What implements did you use under the second contract?

A. The same implements—the centrifugal pump.

269 Q. One pump?

A. One pump.

Q. Did you ever use more than one pump?

A. Not in taking the stone out.

Q. Did you use any other pump for any other purpose?

A. I used three pumps to raise her.

Q. When was she afloat for the first time?

A. Do you mean the date?

Q. Yes.

A. That I could not give you. I don't remember the date.

Q. When did you put the other two pumps to work?

A. After I had bought her I put the two pumps on her deck—two six-inch suction and five-inch discharge pumps. I took the steam from my big tugboat to work those pumps.

Q. After those pumps got to work how soon was she afloat?

A. I had been there fixing those pumps four or five days. I didn't get them to work satisfactorily. After I got them in good trim I don't think I was more than an hour having the boat afloat. I think that was about the time. In two and a half hours I had her across the river. I was glad of that to get rid of the \$5,000 bond. I made quick work of it when I started.

Q. How long were you getting the stone out under your second contract?

A. That is something I could not tell.

Q. State as nearly as you can.

A. It seems to me I was two or three weeks. I had a diver  
270 employed. That diver cost me over three hundred dollars, I think, or two hundred and ninety-some dollars.

Q. State, as near as you can, how long you were working there under the second contract.

A. As well as I can remember, I was there some two or three weeks. I got interrupted; the water got too high one time and I had to abandon it. I could not work, and I think it was near on to three weeks and maybe more. I don't think it was more than three weeks.

Q. You have given in evidence a bond dated the 15th of November, 1893. That is the date of the bond?

A. Yes, sir.

Q. How long was it after that bond was given before the vessel was afloat?

A. I don't think it was more than eight or nine days, as well as I can remember. I know I was several days getting the pumps all ready. I tried it once and did not kind of "gee," and I had to manœuver around to get it to work good. The big pump failed and we had considerable trouble getting her to go right.

Q. What compensation did you get to raise her?

A. I didn't get any. I bought the vessel. She was my vessel at that time.

Q. You bought her before that?

A. Before I raised her.

Q. Before you raised her?

A. Yes, sir.

Q. You bought her before you gave this bond?

271 A. No, sir; I gave the bond before I gave my check for her. I was required to furnish the bond before she was sold to me.

Q. Well, she was sold to you about the time this bond bears date?

A. I don't think I was an hour or an hour and a half getting the bond after the bargain was closed. The only thing I blame myself for I gave seventy dollars more than I ought to have paid for her because I could have bought her for thirty dollars the day of sale. I told my wife about it and she said she ought to "lam-" me for losing seventy dollars.

Q. It was not a bad bargain on the whole?

A. It turned out all right, but I was badly scared. I thought I had an elephant on my hands when these fellows asked the price they did to repair her. I was very glad to get rid of her.

Q. When this bond was given how long had the stone been out?

A. I think she lay some time after the stone was out before they advertised and sold the vessel at public auction. It was some time, I think. They held a survey on her first and then they condemned her, and afterwards sold her at public auction, and she was advertised some ten or fifteen days—I don't know exactly how long it was before she was sold at public auction.

Q. Had the stone been out several weeks?

A. I think the stone had been out several weeks.

Q. Before she was sold?

A. Before she was sold.

Q. When she was over on the flats and you pumped her out first, how long did it take you to get her afloat?

A. With all three of the pumps it wouldn't take longer than two and a half or three hours to float her with all three pumps

272 Q. Have you had much experience in raising vessels?

A. I have raised a good many of my light boats; not vessels. That was the first vessel I ever had anything to do with.

Q. Did you try raising her with the stone in her?

A. Oh, no.

Q. Do you know of any effort being made to raise her after the stone was out and before you tried?

A. I don't think there was any; not as I ever knew of.

Q. Not to your knowledge?

A. Not to my knowledge.

## Redirect examination.

By Mr. HAGNER:

Q. Mr. Lord, you have given the size of the two pumps?

A. Yes, sir.

Q. Will you state the size of the third one?

A. The third one is eight-inch discharge.

Q. Was that larger or smaller than the others?

A. It threw more than three times as much water as the other two pumps together—more than three times as much—an eight-inch solid stream. I don't know how to calculate those, but Mr. Smith, that engineer of yours, the foreman, he made the calculation there. I told him I thought the two pumps would throw as much water, but he made the calculation, and he found that they did not commence to throw as much.

Q. Did you at any time have any difficulty in working the big pump?

A. Yes, sir; that is the reason I got discouraged. The big pump sometimes failed to work.

273 Q. Could you tell why?

A. Well, on one occasion what made me give up, we came to take the pile apart, and we found a great long piece of log in the pipe. It had a terrible suction and closed the pipe up so that very little water could get through.

Q. Was that while pumping the stone?

A. Yes; while pumping the stone.

Q. I had reference to when you were pumping the water out afterwards. Did you have any difficulty with the big pump when working at any time after that, pumping the water out?

A. I think they did, but I don't know exactly what the difficulty was but one time.

Q. Did you make any calculation as to how much water all three of the pumps would throw when all three were working together?

A. I never made any calculation; I was never a great expert on it. They would throw powerful streams.

Q. Did your two small pumps at any time fail to keep her up?

A. After we got her raised?

Q. After you got her raised.

A. No; they kept her afloat until we got her across the river very handy. I think the big pump had stopped after the water had got down very low in her. The centrifugal pump failed to work. It got down below her reach. It would not lift the water any higher.

Q. Is that the reason you carried her over to Analostan island?

A. Yes, sir; that is the reason we hurried her over there.

274 Q. Mr. Wilson's questions, Mr. Lord, have indicated that there was a lack of diligence on the part of some one in respect to the pumping out of the stone and generally as to getting the vessel afloat. Will you state whether you noticed any lack of diligence, either on the captain's part or on the part of the master?

Mr. WILSON: I object to that as immaterial and incompetent.

Q. Did you notice any lack of diligence on the captain's part in this matter?

Mr. WILSON: Objected to as incompetent and leading.

Q. Now answer the question.

A. Well, as far as the captain was concerned I think he was very anxious about getting her up. He seemed to be more worried than I was when the pump would fail to work.

Q. This first contract, Mr. Lord, which was abandoned was dated on the 23d of September, 1893. You stated that you worked several days, I think you said nearly a week, before you abandoned this?

A. I think about that time.

Q. You then sent your dredge and your pumps down to Occoquan?

A. Yes, sir.

Q. September the 23d was the date, as I have said, of your first contract, and October the 3rd was the date of your second contract?

A. Yes, sir.

Q. That is only ten days' difference between them?

275 A. Yes, sir; I didn't go to work immediately after the second contract. The dredge, I told you, was down in Occoquan and I had to get it up here.

Q. After the second contract?

A. After the second contract.

Q. But of those ten days intervening between Sept. 23d and October 3rd, or eleven days, whatever it is, you were working, you say, at least a week?

A. I think I was working a week on the first contract.

Q. The new contract being dated October 3rd, 1893, do you remember the day of the week that was? October the 3rd I find from the calendar was Tuesday. Do you or not remember, Mr. Lord, whether it was the following Monday that you went to work?

A. I don't know whether it was the following Monday, but I know I didn't go to work when I signed the contract.

Q. Why didn't you go to work?

A. My dredge was down the river.

Q. And you had to bring her back?

A. I had to bring her back.

Q. And you say you don't remember the day that you got her up?

A. No; I don't remember the day. If I knew you were going to ask me I would have been posted.

Q. You don't remember the day you got the stone out of her—completed her?

A. I do not.

## Recross-examination.

By Mr. WILSON:

Q. You don't remember the day when you took the vessel away from the wharf over on the flats?

A. What day it was?

276 Q. What day was it?

A. I could not tell you to save my life.

Q. It was not long after the date of that bond?

A. I suppose it was seven or eight days, probably, or maybe nine.

Q. After the date of the bond?

A. I don't believe it was more than seven or eight days. I won't be positive about that.

Q. This is dated the fifteenth of September; a week from that would be about the 22d of September?

A. About that.

Q. Do you mean to say that with the exercise of proper effort that vessel, if she sunk, as she did on the sixth of August, could not have been raised and got out of the way before the 22nd of November?

Mr. HAGNER: I didn't ask him that, Mr. Wilson.

A. That I don't know. I think that after we started her we got her out just as fast as we possibly could. I don't think they had any unnecessary delay in the matter.

Q. Was there any reason, so far as you know, why they should not have started to get her out sooner?

A. That I don't know. I never gave myself any thought about that. I will say this much, that a sunken vessel like that is not an easy thing to get rid of. I don't know how long they would have taken to get that vessel out of there, as heavy as she was loaded with stone. They would have had a pretty long siege of her. I don't know how they would have done it unless they drove piles around her, and it would have made a lot of work to get her out and maybe would have taken longer than it did.

277 Q. You don't know of anything being done towards raising her or emptying her from the sixth of August till you made your contract?

A. I didn't know anything until I was called on. I knew the vessel had been sunk there, but I didn't know what effort they had been making to raise her until they called on me.

Q. When did they call on you first?

A. I guess I could tell more about it by looking here. It is just a few days—one or two days—prior to this, September the 22nd. This is the first agreement.

JOHN B. LORD.

Subscribed and sworn to before me this 9th day of February, 1894.

RUTLEDGE WILLSON,  
*Special Comm'r.*

At the same time and place and in the presence of the same parties also appeared WILLIAM ROBERTS, a witness produced on behalf of libellants, who, being duly sworn and cautioned, testified as follows:

By Mr. HAGNER:

Q. Please state your name, age, residence, and occupation.

A. My name is William Roberts; age, 27; residence, Alexandria. I follow the water for a living.

Q. You are a tugboat captain, ain't you?

A. Yes, sir.

278 Q. Captain, just state when you saw the Ellen Tobin down the Potomac during last summer.

A. It was in the morning about daylight, sir; one week previous to August 2nd, on Wednesday. I don't exactly know what day that was.

Q. Where did you see her?

A. It was between Nanjemoy Stores and Cedar Point.

Q. Well, did you have anything to do with her then?

A. Well, sir, I made a bargain to tow the vessel to Fort Washington.

Q. Did you do it?

A. Yes, sir; I did.

Q. When did you see her again?

A. I saw her again—I went alongside of the vessel about 10 o'clock, as near as I can judge, on Wednesday.

Q. Where was she then?

A. At Fort Washington.

Q. Wednesday, a week after?

A. Yes, sir; August the 2nd.

Q. How long did you lay there?

A. I laid alongside of her probably more than two hours.

Q. Did you go down in her at all?

A. Yes, sir.

Q. Tell us how you came to go down in her?

A. I was laying alongside waiting to tow her to Mr. Smith's dock, and the captain told me it would probably be half past twelve before he would be ready, and I wanted to see whether I could get dinner before I started, and I went down below and there was probably ten or twelve barrels of cement down in her hold.

Q. What did it look like?

279 Mr. WILSON: Question objected to as incompetent.

A. To all appearances it was a very good vessel.

Q. Was there any water down in her?

A. No, sir.

Q. Did the vessel appear dry or wet?

Mr. WILSON: I object to that as leading.

A. Dry.



Q. Do you know, Captain, what class of vessels they put cement in?

Mr. WILSON: The question is objected to as incompetent.

A. Well, I should judge they put cement only in first-class vessels.

Q. Why?

A. Because it is a dangerous cargo to get damp, and under United States contracts they won't receive damaged cement.

Q. Did you see any dampness while you were there?

A. No, sir.

Q. From looking at the vessel from the outside what did her character seem to be?

Mr. WILSON: Note an objection to each of these questions.

A. Well, sir, I think she was a tolerably good vessel, a good vessel.

Q. Where did you take her to from Fort Washington?

A. I landed her alongside of the dock above Mr. Smith's.

Q. Why did you happen to go there?

A. Well, sir, if I am not mistaken there was a vessel loading alongside his dock, loading with stone.

280 Q. And you took the vessel up above?

A. Yes, sir.

WM. ROBERTS.

Subscribed and sworn to before me this 6th day of February, A. D. 1894.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

The taking of testimony herein is here adjourned, to suit the engagements of the respective counsel, to February 14th, 1894, at 3 o'clock p. m., at the same place.

FEBRUARY 14, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same counsel as previously noted, and—

PARK AGNEW, a witness produced on behalf of libellants, being first duly sworn, testified as follows:

By Mr. HAGNER:

Q. State your business.

A. I am in the coal business here in the District—senior member of John P. Agnew & Co.; vice-president and manager of the Marine Railway Ship Building and Coal Co. of Alexandria, Va.

Q. Mr. Agnew, I hand you libellants' Exhibit C to the libel and ask you to look at it and state whether you are familiar with the paper and what it is.

281 A. It is a certified copy of the certificate of survey of the Ellen Tobin, signed by me, William H. Kenzel, and William Gokey.

Q. Were the facts stated in that survey true, Mr. Agnew?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. What was the condition, Mr. Agnew, of the schooner Ellen Tobin when you made that survey?

A. She was a wreck practically.

Q. What was the condition of her decks, do you remember?

A. Her decks were all bulged up—shoved up—we estimated that time in the neighborhood of three feet by reason of the obstruction she had come in contact with on her keel, which had crushed that through and forced centerboard up, and the result of that was to force the deck up and the mainmast.

Q. Mr. Agnew, was the stone in her at the time the survey was made?

A. No, sir.

Q. Do you remember the condition of her decks each side of the masts?

A. No more than they were bulged up and generally rounded off by the force of the character of the strain she was subjected to.

Q. Were there any holes in the deck or not?

A. There were holes in the deck. I was told they were put there for the purpose of pumping the stone out.

Q. When did you last see the schooner Ellen Tobin, Mr. Agnew?

A. I judge about three weeks ago.

Q. Where is she now, sir?

A. On the railway of the Marine Railway Ship Building and Coal Co. of Alexandria.

282 Q. Who owns her now?

A. The Marine Railway, Shipbuilding and Coal Co.

Q. Where did they get her?

A. On the railway. They bought her on the railway.

Q. Who from?

A. John B. Lord.

Q. Who made the bargain in respect to the purchase of her by the company, if you know?

A. The way the company came into possession of her was by trade.

Q. State how.

A. They owned a small tugboat called the Spray.

Q. What was the value of the Spray at that time?

A. I would have sold the Spray to anybody for cash for \$2,500. We valued her anywhere from \$2,500 to \$3,000, and if we received a cash offer of \$2,500 we would have taken it.

Q. Have you stated the bargain, what it was—that is, state the trade.

A. \$1,500 in cash with the schooner on the railway.

Q. For what?

A. For the Spray; \$1,500 cash with the schooner for the Spray.

Q. \$1,500 was paid by whom?

A. John B. Lord.

Q. And the schooner?

A. And the schooner.

Q. For the Spray?

A. Yes, sir.

Q. You stated in the survey there, Mr. Agnew, that you would not have taken the Ellen Tobin as a present as she had been on the railway if you had to repair her?

283 A. Yes, sir.

Q. What is your opinion on that subject now?

Mr. WILSON: I object to the question as leading, incompetent, and immaterial.

A. The only answer I can give to that question is she is still there and I have not repaired her.

Q. What was the object you had in view of taking the Ellen Tobin?

A. The object in taking the Ellen Tobin for the Spray was, I had a piece of property there that was not earning me anything, was an expense, and I did not think that I would lose much by the trade. I had figured that the Tobin as a wreck, with her spars, sails, etc., might be worth anywhere from \$800 to \$1,000.

Q. What are you willing to take for her today?

Mr. WILSON: I object to that question as incompetent and immaterial.

A. \$1,000.

Q. The piece of property you refer to as not yielding you anything, what was that, Mr. Agnew?

A. The Spray.

Q. Have you made any examination of the Tobin, Mr. Agnew?

A. I have of her bottom as she lay on the railway. I have never been on the decks since she has been on the railway.

Q. What is the condition of her bottom as she lies on the railway?

A. The keel is crushed through, shoved up, pointed-shape, like some sharp instrument cutting through her, I judged, anywhere from 25 inches to three feet. She is shoved up to that dis-

284 stance, not snapped at all, but simply crushed; evidently a very tough piece of timber. On both sides opposite this break that is made in the keel are two indentations in the planking just about where the turn in the bilge should commence, I suppose. Probably one of them is two feet in circumference, the other probably 18 inches or something like that. That is the size of the indentations on the Tobin.

Q. From the appearance there and the impression of the substance with which it came in contact, can you say about how wide that substance, whatever it was, must have been?

Mr. WILSON: I object to that question as calling for the opinion of the witness about a matter of which he has not testified to, no foundation having been laid.

A. Judging from the bottom of the vessel, as estimated at about

32 feet, I should say the width of the rock must have been somewhere from 23 to 25 feet.

Q. What was the condition of her bottom, irrespective of these impressions by the rock?

Mr. WILSON: Objected to as incompetent and immaterial.

A. First class.

Q. What was the condition of her timbers, Mr. Agnew?

A. What do you mean by that question? Do you mean the timbers already crushed?

Q. You can speak of those first, if you like.

A. They were good from natural causes, because everybody knows that no timber under water decays and is practically as sound as the day it was put there and would be 100 years hence.

285 Q. What was the general condition of the vessel, irrespective of the impressions you speak of?

A. Very good condition, considering her age; very good.

Q. Do you know how old she was?

A. 20 years, I think. I recollect her when she was first built, coming to Alexandria for coal.

Q. What do you consider, Mr. Agnes, that the vessel would have been worth last summer, say in July?

A. I should think the vessel at that time, considering the condition then existing in the trade in which that vessel was engaged, would be worth about \$10,000. I would like to qualify that. The value of that vessel has been depreciated today by reason of the legislation going on on the tariff, which very materially affects her value—her earning capacity, in other words.

Q. You say that the vessel was sound. What is the place a vessel is first likely to show any indication of rottenness?

A. I have not made any critical examination of the hull of that vessel, and the only point I have examined at all is the bottom on the railway. I have never been on the deck or through the hold of the vessel, but at the point where the damage has taken place the timber is sound.

Q. And about any other part of her bottom?

A. So far as I can see, it is sound.

Q. Are you sufficiently acquainted with vessels and the repairs of vessels to judge of how a vessel is built, whether well or otherwise?

286 Mr. WILSON: Objected to as immaterial and incompetent.

A. Well, I have, through my official capacity in the railroad company at Alexandria, been closely connected and identified with the construction of three of the largest vessels in their time that went on this coast. Under my immediate management there of that company there has been three large coasting vessels constructed.

Q. Will you give your opinion, Mr. Agnew, as to how the Tobin is constructed?

A. From the test the Tobin has been subjected to by reason of

the condition she got into at Georgetown I consider her a well-constructed vessel.

Q. Would her position on the railway give any indication of that fact; her present condition when you last saw her?

Mr. WILSON: Objected to as incompetent.

A. Well, sir, by the marks that indicate the strain the vessel was subjected to by reason of the condition she was in in Georgetown indicate she was a very strongly built vessel.

Q. What was the condition of her butts, Mr. Agnew?

A. After leaving the turn of her bilge they appeared to be intact.

Q. Going up from the bilge or down?

A. Going from the bilge to the deck.

Q. What was the condition of her seams when you saw her last?

A. After leaving the turn of the bilge they were good.

Q. What was the condition of her seams irrespective of the injury you have indicated?

287 A. They were good.

Q. What would have become of the Tobin, Mr. Agnew, in your opinion, if she encountered that obstruction in the berth at Georgetown had she not been as strong a vessel?

A. She would have gone to pieces.

Q. From the condition that you observed of the Tobin in Georgetown when the survey was made will you state whether, in your opinion, the sum of \$1,200 for getting the stone out of her was or was not a reasonable sum for the work done?

Mr. WILSON: Objected to.

A. Getting the stone *of* out of her or raising her?

Q. Getting the stone out of her for \$1,200—

A. I don't think I am competent to answer that question, because I never engaged in getting any stone out.

Q. What, in your opinion, would have been a fair price for raising the Ellen Tobin after the stone had been taken out when she lay there on the obstruction in the berth at Georgetown?

A. As I consider as one of the surveyors the condition of that vessel as she lay on that rock, I would suppose that a reasonable sum of money for raising that vessel and putting her afloat would be anywhere from \$2,500 to \$3,000 for raising her—that is, irrespective of taking any cargo out of her.

Q. What was required to raise her, Mr. Agnew?

A. Well, from that standpoint, to raise the vessel, the view I took of her, would be that she had got to have chains put under her and lighters put alongside, and she had got to be bodily lifted up  
288 by those chains and sinking those scows and pumping them out, and taking the slack and sinking again and pumping out and getting her leverage in that way.

Q. Do you think that giving the Ellen Tobin for raising her was a high price?

A. You could not have given her to me for raising her is the only way I could answer that.

Q. Would you or not have taken her for the raising?

A. No, sir.

Q. What would you have had to be paid in addition?

Mr. WILSON: I objected to all these questions and answers.

Q. What would you have required, Mr. Agnew?

A. I certainly would not have taken the vessel for raising her; I am not a wrecker; I would not have taken the vessel for raising her.

Q. In your opinion, with what you know of vessels, would it have paid any one to take the vessel for the raising?

A. I think not.

Cross-examination.

By Mr. WILSON:

Q. You are not in the business of raising vessels?

A. No, sir.

Q. Did you make a bid for repairing the vessel?

A. No, sir.

Q. Did you know of any being made?

A. Yes, I did.

289 Q. By whom?

A. I heard Mr. Brewster, of Baltimore, made a bid.

Q. You didn't make any yourself?

A. No, sir.

Q. When did you see the vessel last before she was sunk in Georgetown?

A. I have not seen that vessel before she was sunk, I don't suppose, for ten years. I knew the vessel when she was first built. When she was first built she was a vessel at that time of extraordinary size for the market here. I haven't known anything outside of her disaster for certainly ten years.

Q. If she were afloat now in the condition you suppose she was in before she was sunk what would she be worth today?

A. I would say a vessel of that character ought to be worth \$10,000.

Q. Now?

Mr. HAGNER: I object to the question as to what she is worth now as immaterial.

A. In the condition of the traffic she was engaged in she was worth previous to the legislation now going on, which is going to detract from the value of every other vessel.

Q. What would she be worth now today—not when she was sunk?

Mr. HAGNER: I object to the question, since it seems to involve a political question, and that is in the hands of a very much wiser power than even that exerted by three lawyers, and so irrelevant.

290 A. She would practically, if this legislation had not affected her earning capacity, be worth as much as she was worth

last summer, but the legislation now going on is of a character that detracts from the earning capacity of that vessel for the future.

Q. Have you made any estimation of the cost of repairing her?

A. Nothing more than to satisfy me that it is more than I care to tackle at this time.

Q. Why at this time?

A. Because of the uncertainty of the future earning capacity of property of that character, owing to the legislation now going on in Congress.

Q. If she were repaired there might be nothing for her to do?

A. Yes, sir.

By Mr. BARNARD:

Q. What, from the appearance of this vessel, in your judgment, was the cause of this disaster to her?

A. Well, that is a hard question. There is but one answer to that question—that is, that there was not sufficient draught of water over and above the obstruction that existed there at low tide to accommodate this vessel with the draught of water that was required, and necessarily she came in contact with that obstruction, which was of such a character as by the weight of the vessel to cause her to crush through in the keel.

Q. What was the apparent weight of the cargo taken from this vessel, so far as you know?

A. I know nothing more than hearsay, and that is that she contained about four hundred tons of crushed stone.

291 Q. Should such a weight, in your opinion, crush a vessel as she was crushed?

A. Undoubtedly where there is not sufficient water. It indicates that the vessel has been, just as it were, on a pivot. There was evidently enough water fore and aft, and that this obstruction was amidships, which was a rock, for we know of no other obstruction in Georgetown excepting a rock, and that vessel was balanced as a scale is balanced, and there was nothing to do; she could not settle otherwise than to crush through at this point to get her bearings. That is about as near amidships as you could get a thing.

Mr. WILSON:

Q. How long have you owned the Spray?

A. I built her.

Q. How long ago?

A. Six or seven years. I can give you the date, though.

Q. Six or seven years?

A. Yes, sir.

Q. Was she in good order?

A. Barring the wear and tear for that period of time; no repairs put on her.

Q. Was she insured?

A. Yes, sir.



Q. Against fire?

A. Yes, sir.

Q. For how much?

A. \$3,000.

Q. You have owned her all the time?

A. Yes, sir.

292 Q. From the time she was built?

A. Yes, sir; that is the railway Co.

Redirect examination.

By Mr. HAGNER:

Q. Mr. Agnew, if a vessel goes for six or seven years without rotting what is the likelihood of her lasting?

Mr. WILSON: I object to that question as immaterial and incompetent.

A. The supposition is that after a vessel is built which lasts six or seven years without showing any amount of decay that the life of that vessel is going to be quite a number of years in advance of that. That is a well accepted theory—that the time and season of the year that timber is cut in the woods adds to its life; in other words, there are times that the condition of the sap in the timber is such that if cut between periods it is of a long or short life. The supposition is that if you build a vessel and put that timber into her frame if she lasts six or seven years without signs of decay she has a possibility of quite a long period in advance of that. I don't know that there is any stereotyped rule for the supposition or acceptance of that condition of things, but that is the general impression.

Q. I don't know what your answer would be, but I would like you to state, if you know, what are the greatest ages that vessels have been known to last.

A. I could not answer that question. We have had vessels on our railway that were twenty-five and thirty years of age, and  
293 when we opened up to repair them they were so bright as to astonish everybody, and have others six or seven years and open her up and the timbers would be rotten.

Q. It is in testimony here that the Ellen Tobin has been kept in good repair—that the timbers or any timbers that had rotted has been taken out when she had been opened—

A. It may have been that the Ellen Tobin was a well-salted vessel—a vessel that we call salted between the outside planking and the seaming. It is customary when you build vessels to salt them—to fill in the crevices between the timbers—the outside planking and the inside sealing. We fill that in with salt as a preservative. That might have been done with the Tobin. That is put as a preservative of timbers. That is done with small vessels.

Q. (continued). And that she is nineteen years old. Is a vessel with such a record likely to last?

Mr. WILSON: Objected to as immaterial and incompetent.

A. The supposition is that in that period of time that she would have a much longer life if sound at this time from natural causes.

Recross-examination.

By Mr. WILSON:

Q. Have you any idea what the Spray cost originally?

A. Indeed, I have.

Q. How much?

294 A. Between \$5,600 and \$6,000.

PARK AGNEW.

Subscribed and sworn to before me this 21st day of February, 1894.

RUTLEDGE WILLSON,  
*Special Comm'r.*

Adjourned to meet on Wednesday, the 21st of February, 1894, at 3 o'clock p. m., at the same place.

FEBRUARY 21st, 1894—3 p. m.

Met pursuant to adjournment last noted.

Present: Randall Hagner, Esq., counsel for libellants; Nathaniel Wilson and Job Barnard, Esqrs., proctors for respondents, and—

JAMES WHITE, a witness of lawful age, produced and sworn on behalf of libellants, testified as follows:

By Mr. HAGNER:

Q. State your name, age, residence, and occupation.

A. James White; 34 years old; Norfolk, Va.; sailor by occupation.

Q. Tell us if you ever had anything to do with the schooner Ellen Tobin.

A. Yes; I made the round trip in her from Norfolk to New London. I shipped in her at Norfolk, June 28th, 1893.

Q. Was any one else shipped with you at the same time?

A. Yes; a soldier from Old Point. I don't know his name. We shipped in Norfolk and was towed down to Lambert's point,  
295 and there loaded with coal and went to New London.

Q. How were you engaged?

A. As sailor before the mast. I shipped on her for the round trip.

Q. How many — sailors were there than you?

A. Three more besides me.

Q. Where did you go from New London?

A. To Rondout, above New York.

Q. What became of the other two sailors?

A. They were discharged at New London, and Bill and I were the only sailors up to Rondout and back to New York.

Q. Were there any more sailors on her from New York to Fort Washington?

A. Yes; he shipped two new ones in New York.

Q. What was the character of the Tobin?

A. She was very good.

Q. How often did you see pumping on her?

A. At six at night and six in the morning, if we were anchored or tied at wharf.

Q. Was there any custom about pumping her?

A. From twenty to twenty-five strokes.

Q. You misunderstand me. I mean was there any custom in the vessel as to what time she was pumped?

A. I have already said she was pumped six o'clock night and morning, from 20 to 25 strokes of the pump. She would suck at that; that was all there was in her.

Q. When sailors before the mast reach a port what is, if you know, *what is the custom?*

Question objected to as incompetent and irrelevant.

296 A. The captain discharges and pays them off.

Q. What, if you know, is the reason for that?

Same objection noted.

A. Because it is too long unloading and getting a cargo to go away again.

Q. Did you have any accident aboard the Tobin that you remember while you were on her?

A. The boom got broke in a squall while we was anchoring her.

Q. Was there any accident to the body of the vessel while you were on board of her?

A. None at all.

Q. Where were you discharged from the Tobin?

A. At Fort Washington.

Q. Where did you go then?

A. To Baltimore, and went to sea on another vessel.

Q. Do you know what the custom is as to sailors while they are at a wharf at night on merchant vessels, for them to keep watch?

Question objected to as incompetent and irrelevant.

A. No, sir; they don't keep any.

Cross-examination.

By Mr. BARNARD:

Q. How long were you on board the Ellen Tobin?

A. I left her some time in August—July, I believe it was; some time in July or August.

297 Q. You never were on her before June 28, 1893?

A. No, sir. It was the 10th of August that I left. I remember now.

Q. During that time what weight of cargo had the Ellen Tobin had on board?

A. She had soft coal when she went to New London; 576 tons, so the captain said.

Q. You have no knowledge yourself?

A. No, sir; only what the captain said.

Q. Did the vessel leak any more with that cargo on board than she did when she was empty?

A. She did not leak any more loaded than she did when she was light; about the same quantity all the time.

Q. How much water did she require when she had a cargo on board of that size?

A. That is something me don't know.

Q. Did you pump any yourself?

A. Yes, sir; we four men had it all to do, sailors before the mast.

Q. How do you know the Ellen Tobin was a good boat?

A. Because she was a great deal better than a great many more that I had been on.

Redirect:

Q. Are you fond of pumping?

A. No, sir.

Q. Is it very hard work?

A. It is hard work, the hardest we have to do on board of a vessel.

Q. If you had had a good deal of pumping on board the  
298 Ellen Tobin would you remember it?

A. Yes, sir; I would.

Q. How did the amount of pumping compare with that of other vessels you have been on?

Objected to as incompetent.

A. I have pumped from 200 to 300 strokes an hour on board of other vessels; sea-going vessels, too.

his  
JAMES x WHITE.  
mark.

Subscribed and sworn to before me this 21st day of February, 1894.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

At the same time and place and in the presence of the same counsel also appeared RANDALL HAGNER, attorney for libellants, who, appeared in their behalf, being first duly sworn, testified as follows:

As there was no one here very often representing the owners of the schooner Ellen Tobin except myself, I hope I will be pardoned both by the court and counsel for testifying in regard to the proving of notice, and will try to refrain from testifying as to  
299 facts, except where they are within my own peculiar knowledge, and therefore necessary. I was first employed by Mr. Endicott, managing owner of the schooner Ellen Tobin, on the 18th day of August, 1893, to report to him as soon as the owners should get together whether they were compelled by law to raise her or not. There was to be a meeting of the owners by a certain day, I

think the following Monday week from that time, and he wanted the report by that day. That report I made to the effect that the law required the owners to raise the vessel and get her out of navigable water. I sent on my report to be ready by the time the owners should meet. Some 19 or 20 days after that I was employed regularly and retained to attend to and take charge of this case on the part of the libellants. I wrote to the Mess. Charles G. Smith & Son on September 13th, 1893, a letter of which the following is a copy :

"SCHOONER ELLEN TOBIN, *September 13th, 1893.*

Mess. Charles G. Smith & Son, the Potomac Stone Co.

DEAR SIR: The owners of the schooner Ellen Tobin have employed me to bring suit in admiralty against you to recover damages for the injury by her sustained by reason of her being sunk in the berth at your wharf in Georgetown. Before suing any one, it is my custom to inform the party in order that, if possible, an arrangement of settlement may be made.

Respectfully yours,

RANDALL HAGNER."

I offer in evidence the copy of this letter, to be marked Exhibit A, Hagner.

300 Notice is here given to produce the letter, the copy of which has been read.

In reply to that letter I received the following letter :

"Charles G. Smith & Son, operating the quarries of the Potomac Stone Company."

(And some other headings.)

"WASHINGTON, D. C., *Sept. 15th, 1893.*

Randall Hagner, 406 Fifth St. N. W.

DEAR SIR: We have received your letter of the 13th inst. regarding the schooner Ellen Tobin. We have turned this matter over to our attorney, Mr. Job Barnard, of 500 Fifth St. N. W., and would therefore refer you to him.

Respectfully,

CHARLES G. SMITH & SON."

I offer in evidence this letter, to be marked Exhibit B, Hagner.

As soon as I received the letter of the Mess. Smith & Son I immediately went to see Mr. Barnard and informed him of the letter and that I had been employed by the owners of the Tobin, and asked him if Mr. Smith would make any settlement of the case or help to take the crushed stone out of the vessel, so that we could see her condition and whether it would pay to repair her. Mr. 301 Barnard and I then went over to see the vessel ourselves.

I am almost certain this was Saturday afternoon. On the following Monday I again saw Mr. Barnard, and he telephoned for Mr. Smith, Jr., and they had a conference over the matter. They informed me that they would let me know about the matter. A day or two passed, and I was informed of the bid which had just been

received from the Mess. French and Cole, wreckers, of \$8,000, which bid is Exhibit No. 1, Hankins, to the testimony. I went again to see Mr. Barnard, and he again telephoned for Mr. Smith, Jr., and he came over. I stated to them the amount of the bid, and told them that somebody—either the Smiths or the owners—would eventually have to foot that bill, and that, in order to save time, if they insisted on it I would accept that bid or I would look elsewhere and try to get the work done cheaper. They talked while I waited in the outer office, and then announced that by all means I should try elsewhere rather than accept such a large bid. I then went with Captain Hankins down to the 7th St. wharf and inquired around there if any one had a steam pump about here. I had already informed myself that the only pump in Baltimore had already gone to the bottom of the bay. I heard that Mr. John B. Lord had a pump, and that it was at or near Occoquan or Quantico, which are near by each other. I happened to know Mr. Lord, and I went to see him, but could not find him until the next day, I think. The captain and I saw him together, and he finally agreed with the captain to try and pump out the stone under the first agreement for \$800 in case of success. That is Exhibit B to the libel and C, Hagner, to this testimony. The result of that agreement has already been testified to by Mr. Lord. It was thrown up. The date of that  
302 agreement is the same as the date of the agreement of the Mess. Smith to handle the stone as pumped out, the Smith agreement being Exhibit B to the libel.

This agreement is here offered in evidence, to be marked Exhibit C, Hagner.

When the captain and Mr. Lord made the second agreement I went to Mr. Barnard's office before it was signed to see him, but could not find him. Mr. Lord has sent his pump dredge to Occoquan or Quantico, and came to my office and wanted the agreement signed that afternoon so that he might send down for his dredge at once, and I had the captain sign that second agreement with Mr. Lord in order to save time, and I informed Mr. Barnard on the following day that it had been done. He said he did not see there was anything better could be done. As soon as Mr. Lord let me know, as arranged previously that he should, that he had gotten the crushed stone out of the vessel, I informed Mr. Endicott, managing owner, and had the custom-house officers sign notice, which is in my handwriting and in quintuple and dated Oct. 30th, 1893.

This quintuple is here offered in evidence, signed by the deputy, to be marked Exhibit D, Hagner.

I served one of those quintuples of notice of condemnation on Mr. Charles G. Smith, Sr., at his office, on the day of its date. I also served on Mess. Edwards and Barnard another one on the same date. As soon as the condemnation or survey was had, November 2d, 1893, the vessel, her furniture and outfitings, were advertised for sale in the Evening Star newspaper, beginning on that same day, November 2d, 1893, as will appear from the advertisement I here produce. I served on Mess. Edwards and Barnard,

at their office, on Nov. 7th, 1893, at 4.03 o'clock, the paper which I here have. Mr. Barnard was not in his office at the time, 303 and his clerk said that he would be back in a few minutes, and I left it for him on the top of his desk, where he could not help seeing it when he came back.

I offer that paper in evidence, to be marked Exhibit E, Hagner.

I also served a copy of the same paper on Mr Smith, Jr., the gentleman here present, at his office, at 12.05 o'clock on the 8th day of November, 1893, and handed it to Mr. Smith himself.

I also offer this paper in evidence, to be marked Exhibit F, Hagner.

The reason that from the 2d to the 7th of November I did not give those notices was that there were several corrections to be made in the advertisement, and as they had to be made I waited, as the rule requires only six days' notice of a sale in admiralty. The first advertisement, as I will show by proper evidence, was repeated beyond the time first ordered. It was inserted on the 2nd, the 4th, the 7th, the 11th, and the 13th of November, 1893.

These I also put in evidence, to be marked Exhibits G and H, Hagner, respectively.

Mr. Charles G. Smith, Jr., attended the sale, although he did not bid. I hardly suppose, therefore, this testimony I have given in regard to the notices is very important.

I also offer in evidence the bill of Mr. Smith and his receipt therefor under date of Dec. 7th, 1893, for \$40, provided in the agreement marked Exhibit B to the libel, to be marked Exhibit I, Hagner.

I also offer in evidence a letter from Mr. Smith in regard thereto, to be marked Exhibit J, Hagner.

I also offer in evidence the original permanent certificate 304 of enrollment of the schooner Ellen Tobin, to be marked Exhibit K, Hagner.

I also offer in evidence a certified copy of the will, as provided under the act of Congress, of Harriet E. Burnett, deceased, to be marked Exhibit L, Hagner.

I also offer in evidence a certified copy of the will of Michael S. Allison, properly certified by the judge and the clerk, to be marked Exhibit M, Hagner.

I also offer in evidence an exemplified copy of the will of the late Peter J. Connolly, properly certified by the judge and the clerk, to be marked Exhibit N, Hagner.

In response to the notice given me by the gentlemen who represent the respondents, I produce the various bills of sale from the owners of the Ellen Tobin to John B. Lord, which, as I desire to deliver them to him, I will request counsel for respondents to make a stipulation about. Stipulation made and order of court made thereon March 22, 1894, and both filed with papers; order recorded

M. D. C. 2, p. 21.

305 Whereupon, without cross-examination, which was reserved, the session was adjourned to meet on Wednesday, the 28th of February, 1894, at 3 o'clock p. m., at the same place.



WEDNESDAY, *February 28th*, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same counsel as before.

Whereupon Mr. Hagner continued his testimony.

Mr. HAGNER: I offer the will of Thomas D. Endicott in evidence, properly certified, to be marked Exhibit O, Hagner; also the will of Christian D. Emson, also properly certified, to be marked Exhibit P, Hagner.

The day after the public sale of condemnation the contract or conditional sale was made with Mr. Lord and the \$5,000 bond was required at the public sale, and upon the sale to Mr. Lord, in order to prevent an irresponsible party buying her and promising to raise her and then stripping her and selling her sails, outfittings, and dunnage, whatever it may be called, consisting of her anchors, chains, rigging, and junk, and then abandoning her without raising her and leaving her owners subject to a fine of \$5,000 under the act of Congress of 1890, I was offered just after the public sale by a man from Baltimore \$300 for her outfitting, anchors, chains, ropes, spars, etc., but had I accepted it we would have had no opportunity of getting the vessel taken by any one as a whole and having the additional inducement of her value as wreckage or junk offered  
306 to the man who remove her. The day after the sale Mr.

Lord made the contract of conditional sale, and I was present on the afternoon of November the 23d and saw her rise as she was being pumped out. I want to produce in answer to Mr. Wilson's demand the bills of sale.

(These bills of sale were subsequently placed in evidence and withdrawn by stipulation and order of court.)

As long as she was at the bottom of the river in the berth — of \$10,000 had to be spent on her, I considered that we were safe; but as soon as the stone was pumped out we thought it best to hold a survey as to the propriety of attempting to repair her. I desire to add that notices were put up of the sale on board the Tobin; also on one of the posts holding up the stone-crushers and at the Potomac boat-house, all prominent places, where they could be seen. These notices will be testified to by Mr. Endicott.

RANDALL HAGNER.

The cross-examination of Mr. Hagner was postponed until the other session.

307

LIBELLANTS' EXHIBIT A, HAGNER,

is a letter from Randall Hagner to Chas. G. Smith & Son, dated September 13, 1893, notifying them that he was retained to recover for the injury to the Ellen Tobin.

## LIBELLANTS' EXHIBIT B, HAGNER.

Charles G. Smith & Son, operating the quarries of the Potomac Stone Co., &c.

WASHINGTON, D. C., *Sept. 15th*, 1893.

Randall Hagner, Esq., # 406 5th St. N. W.

DEAR SIR: We have rec'd your letter of the 13th inst. regarding the schooner Ellen Tobin.

We have turned this matter over to our attorney, Mr. Job Barnard, of # 500 5th — N. W., and would therefore refer you to him.

Yours truly,

CHAS. G. SMITH & SON.

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## LIBELLANTS' EXHIBIT D, HAGNER.

In quintuplicate.

GEORGETOWN, D. C., *October 30th*, 1893.

To Charles G. Smith & Son and the Potomac Stone Company and to Charles G. Smith and Son or to the Potomac Stone Company is who- it may concern :

Take notice that upon request of the owners of the schooner Ellen Tobin I will hold a survey of expert men on the morning of Wednesday, November 1st, at 10 o'clock (that being the hour of low tide), of and upon said schooner, from which the crushed stone has now been removed, in order to ascertain whether she is capable of repair at a price which will justify such repair, and, if not, then that it may be determined whether she should be condemned and sold for the best interest of whom it may concern.

E. P. WATKINS,

*Sp'l Dep. Col.*

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## LIBELLANTS' EXHIBIT I, HAGNER.

WASHINGTON, D. C., *Nov. 29th*, 1893.

Owners of Schooner Tobin

Charles G. Smith & Son, office and crusher, No. 3220 Water street.

To unloading stone from scows, as per agreement. . . . . \$40 00

Rec'd payment Dec. 7th, '93.

Thanks.

CHARLES G. SMITH & SON.

310

## LIBELLANTS' EXHIBIT J, HAGNER.

Charles G. Smith & Son, operating the quarries of the Potomac Stone Co., &c.

WASHINGTON, D. C., *Nov. 29*, 1893.

Randall Hagner, Esq., # 406 5th St.

DEAR SIR: We herewith inclose bill for unloading cargo of schooner Ellen Tobin, as per agreement.

We understood that this was to be paid when work was completed, and, if convenient, kindly send us check for same.

Yours truly,

CHAS. G. SMITH & SON.

311

LIBELLANTS' EXHIBIT K, HAGNER.

Certificate No. 42.

Permanent. Official numbers—Numerals, 8994; letters, JPCN.

THE UNITED STATES OF AMERICA:

Sec. 4319, Rev. Stats. (N. Y. Cat. No. 389a.)

(Vignette of vessel.)

*Certificate of Enrollment.*

Enrollment in conformity to title L, "Regulation of vessels in domestic commerce," of the Revised Statutes of the United States.

\* Charles G. Endicott, of Jersey City, New Jersey, having taken and subscribed the oath required by law, and having sworn that he, owning  $\frac{1}{64}$ , † together with Charles Burnett,  $\frac{8}{64}$ , of said place; Drusilla M. Cox,  $\frac{4}{64}$ ; Harriet E. Burnett,  $\frac{4}{64}$ ; Michael De Mott Vreeland,  $\frac{2}{64}$ ; Henry Abranford,  $\frac{1}{64}$ ; Michael S. Allison,  $\frac{2}{64}$ ; Henrietta W. Allison,  $\frac{2}{64}$ ; Richard C. Washburn,  $\frac{2}{64}$ , all of Jersey City, N. J.; Michael Tobin,  $\frac{6}{64}$ ; Peter J. Carnell,  $\frac{2}{64}$ , of New York; Charlotte A. Burnett,  $\frac{2}{64}$ ; Christian D. Emson,  $\frac{8}{64}$ , of Callison Mills; Wm. B. Lloyd,  $\frac{4}{64}$ , of South Grange; John Van Buskirk,  $\frac{4}{64}$ , of Bayonne, N. Y.; Thomas Endicott,  $\frac{8}{64}$ , of Mays Landing; W. J. Booth,  $\frac{4}{64}$ , of Alexandria, Va., and citizens of the United States and sole owners of the ship or vessel called the Ellen Tobin of New York, whereof John Hankins is at present master, and is a citizen of the United States, and that the said ship or vessel was built at Kennebunk, State of Maine, in the year 1874, as appears by ‡ permanent enrollment No. 7, issued at New York July 7, '90, now cancelled, properly changed, and said enrollment having certified that the said ship or vessel has two decks and three masts, and that her length is one hundred and thirty-six, 136, feet; her breadth, thirty-two, 32, feet; her depth, fourteen, 14, feet; her height, — feet; that she measures four hundred and thirteen, 413, and  $\frac{80}{100}$  tons, viz:

Capacity under tonnage deck . . . . .	419 tons	78-100ths.
Capacity between-decks above tonnage deck . . .		
Capacity of inclosures on the upper deck . . . . .	15	58
Gross tonnage . . . . .	435	36

\* Insert here the name of the person, with his occupation and place of abode, by whom the oath or affirmation is to be made.

† If more than one owner, insert the words together with and the name or names, occupation, place or places of abode of the owner or owners, and the part or proportion of vessel belonging to each owner.

‡ Here describe previous document.

373	Deductions under section 4153, Revised Statutes, as amended by act of August 5, 1882.....	21	76
	Net tonnage.....	413	60

that the following-described spaces and no others have been imitted, viz., —, and that she is a \*schooner, has a billet head and a square stern, and † sufficient security having been given, according to the said title, the said ship or vessel has been duly enrolled at the port of New York.

Given under my hand and seal, at the port of New York, in the district of the city of New York, this 12 day of August, in the year one thousand eight hundred and ninety-two.

JOUNED GUNNER,  
*Deputy Collector of Customs.*

SALLAY,  
*Deputy Naval Officer.*

(Endorsed:) (N. Y. cat. No. 389a.) Permanent. Certificate of enrollment, No. 42, of the schooner called the Ellen Tobin, 413.60 tons. Issued at the port of New York Aug. 12, 1892.

313 At the same time and place and in the presence of the same counsel also appeared FREDERICK DAVEY, a witness produced on behalf of libellants, —, being duly sworn, testified as follows:

By Mr. HAGNER:

Q. State your name, age, residence, and occupation.

A. Frederick Davey; age, 65; residence, Western New Jersey; occupation, coast captain—captain of coasting schooner—and vessel-owner. Of late years I have not been an active captain.

Q. That has been your occupation, sir, for how long?

A. Well, since I was 20 years old I have been active in that line.

Q. Have you been called upon by owners at any time as arbitrator in matters of collision and such matters?

A. Yes, sir; several times.

Q. Have you any interest in the schooner Ellen Tobin, or have you had any interest?

A. No, sir.

Q. How long have you known the Ellen Tobin, Captain?

A. Ever since she came to Jersey City first.

Q. Do you remember when that was?

A. That was about nineteen years ago.

Q. What was her character, Captain?

A. First-class, three-master, double-decker, schooner,

\* Insert here the particular kind of vessel, whether ship, brigantine, scow, schooner, sloop, or whatever else.

† In every original enrollment insert the following: "The said — having agreed to the description and measurement above specified, and."

- Q. Do you know whether or not she had been repaired and kept in order?
- 314 A. I know she has been kept in good condition; yes.
- Q. Her age, you have stated, is nineteen years?
- A. Yes; about nineteen years old.
- Q. I will ask you now, Captain, what is the critical age of a vessel?
- A. The first six or seven years, as far as the lasting qualities go.
- Q. When did you see the Tobin last summer?
- A. I saw her on the 18th day of August as she lay on the bottom in Georgetown?
- Q. What was her condition at that time?
- A. Well, a wreck, sunken, full of water, with her back broken and ruined.
- Q. What was the condition of her decks, Captain?
- A. It was raised by the trunk—shoved up.
- Q. What do you mean by the trunk?
- A. Centerboard well—breaking up of her lower and upper beams and shoving up the mainmast.
- Q. How far were the decks shoved up?
- A. I judge three or three feet and a half.
- Q. What would that indicate?
- A. That indicated her back was broken, which means keelson and keel and floor timbers.
- Q. What was the condition of the sides of the vessel?
- A. They seemed to be intact.
- Q. Well, what would that indicate, the fact of the sides being intact?
- A. It would indicate that the bottom had broken up.
- Q. Could you then make any estimate of what it would cost to get the crushed stone out and raise her, Captain?
- A. I think it would cost \$5,000 or \$6,000, at least. I don't
- 315 know much about that kind of business, what it would cost to raise her; that was a kind of guess.
- Q. Could you tell whether she was worth enough to pay for taking the crushed stone out and raising and repairing her?
- A. If she was out on the dry dock I would not take her as a gift and repair her.
- Q. From what you saw there?
- A. From what I saw there that day.
- Q. What would you have regarded the value of the Tobin prior to the injury in the berth at Georgetown?
- A. Ten thousand dollars I should say she was worth before she was injured.
- Q. What would you consider it would have taken to repair her at that time?
- A. Eight or ten thousand dollars; but you could never make a good vessel again of her if you did repair her, as all the fastenings in that vessel were strained, and you never could get her back again enough to make a good vessel of her, the middle being bulged up and the ends had fallen down and strained her fastenings.

Q. How do you know she was in such a state when you could not see her bottom?

A. Well, by the decks and the mainmast being shoved up showed conclusively that her backbone was broken, or, in other words, the keelson and keel and floor timbers.

Q. Did you go to see for Mr. Endicott any wrecker in order to raise her?

A. I did.

316 Q. What company?

A. I went to the Merritt Wrecking Co. of New York, the largest in the United States.

Q. What was the result?

A. Well, the result was that they declined to make a bid on it.

Mr. WILSON: Objected to as hearsay and immaterial and incompetent.

Q. Did they say why?

Mr. WILSON: Objected to for the same reasons as above.

A. They said there had been a good many wrecks along the coast and they had all then could attend to, and their business was not much this kind of business, as it was attending wrecks along the coast and saving valuable property.

Q. Do you know whether the owners were doing anything because of her having been sunk prior to your coming on here?

Mr. WILSON: Objected to as leading, incompetent, and immaterial.

A. I know they had been on here and were trying to get her raised.

Q. Captain, what is the principal company in the country which gives registered rates on vessels?

A. The "Shipmasters' Association" of New York publishes a book called "The Record," which I think is the principal one in the business.

Q. Where do they hold forth?

A. Williams St., New York, near Wall.

317 Q. Do you know whether that is the company in which the Tobin was formerly rated?

A. I know it was.

Cross-examination.

By Mr. WILSON:

Q. How came you to come to Georgetown last August?

A. I came at the solicitation of Mr. Endicott and the owners of the Tobin.

Q. For what purpose?

A. To see what had better be done towards removing her, and we thought some of holding a survey, and they wanted me to be one.

Q. Have you any interest in the Tobin ?

A. I have not. I came merely as an advisor with him.

FREDERICK DAVEY.

Subscribed and sworn to before me this 1st day of March, 1894.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

At the same time and place and in the presence of the same counsel also appeared CHARLES BURNETT, one of the libellants, — was produced and testified as follows, after being duly sworn :

By Mr. HAGNER :

Q. State your name, age, residence, and occupation.

318 A. My name is Charles Burnett ; residence, Jersey City, N. J. ; my age is close on 80 years ; my occupation has been seafaring, and as vessel-owner, and I own them still.

Q. How long have you been master of vessels ?

A. I was master, actively, from 1836 to 1872.

Q. What interest do you own in the Tobin now, Captain ?

A. I own one-eighth of her, and by will one-sixteenth more ; that my wife left to me.

Q. By the will of your wife, Mrs. Burnett ?

A. Mrs. Burnett.

Q. One-sixteenth by her will ?

A. Yes.

Q. At one time were you managing owner ?

A. Yes, sir.

Q. Of the Ellen Tobin ?

A. Yes, sir.

Q. As such, do you know whether there have been any sales by the several executors named in the libel ?

A. My eyes won't let me read.

(Mr. Hagner reads from the libel.)

Q. Do you know whether or not there have been any sales of any interest in the Tobin by these executors ?

A. There have not been.

Mr. WILSON : Objected to as hearsay and incompetent and secondary evidence.

Q. Had there been any such sales, Captain Burnett, would you have known it ?

319 A. I could not help knowing it. It would have been enrolled in the register of the custom-house. You could tell from that whether there were sales or not.

Q. Did you come on here during last summer ?

A. I did.

Q. When was it ? Do you remember ?

A. I was on here twice. Do you want to know both times ?

Q. What was the first time ?



A. My memory is rather poor. Let me look here (witness looking at papers). 10th of August.

Q. Who did you come on here with?

A. Mr. Endicott.

Q. Was that the first time he was on here, or do you know about it?

A. No; he was here before.

Q. Did you see the Ellen Tobin at that time?

A. Yes, sir.

Q. What was the condition of her decks, etc.?

A. I saw her decks raised up, I should imagine, three feet or three feet and a half. Her sides looked well; deck beams and deck were all raised up.

Q. As far as the vessel was concerned could she be injured by being allowed to remain where she was?

A. No, sir; I don't see how she could.

Q. Why not?

A. Because she was injured as bad as she could be then; she was square on the rocks.

Q. What was the nautical term for her condition at that time?

320 A. I should call her condition a very bad one. I had no idea she could be repaired to make her as good as she was before. I was the largest owner in her.

Q. Now, her sides being in good condition and the decks being shoved up, what did that indicate?

A. It indicates that there was a rock, or something like it, right along under the vessel, and it shoved it right up. It must have been a narrow one. You know the report of that.

Q. What would you call the condition of the vessel at that time? Make one short word of it.

A. I should call it "played out." That is what I would call it.

Q. Would you call it a wreck?

A. A wreck.

Q. What would you say was the condition of her back?

A. I should say all she was worth was to strip her.

Q. What would you call her back?

A. Her keelson was broken.

Q. Is that the nautical term?

A. Yes, sir.

Q. Do you know whether the Tobin had ever been salted?

A. I do know. She was salted when built, and she was salted different years afterwards.

Q. Who paid for the salting?

A. The owners.

Q. What was her condition as to having been kept in repair or not?

A. First-class condition.

Q. Had she been well kept up?

A. Well kept up.

321 Q. What was she worth prior to the injury, Captain?

A. She was worth all of \$10,000.

Q. You say you had been a managing owner?

A. Yes, sir.

Q. How long ago was it you had been a managing owner?

A. Well, probably six or seven years.

Q. Who did you turn her over to as managing owner at that time?

A. Mr. Endicott.

Q. What was the condition of Mr. Endicott's health last summer, Captain?

Mr. WILSON: Objected to as immaterial and incompetent.

A. When he and I came on here the 10th of August Mr. Endicott's health was good. We went home and my health was poor, and he was put in charge to attend to the vessel or whoever was appointed to help. He was taken sick.

Q. Do you remember what day he was taken sick?

A. (Looking at paper.) The 23rd of August.

Q. He was taken sick the 23rd of August?

A. Yes, sir; badly sick, too.

Q. What was the matter with him, do you remember?

A. Well, I think he had gall-stones and fever.

Mr. WILSON: That is objectionable as wholly immaterial and irrelevant.

Q. Could he attend to business?

A. No, no. The doctor would not let him attend to anything. He was not capable of attending to anything.

322 Q. Who took charge as managing owner temporarily at that time, Captain Burnett, when Mr. Endicott was taken sick?

A. Mr. Endicott's partner called the owners together. I had gone away, understand, then. He called the owners together and appointed Captain Davey here and some others of the owners to attend to it and wrote for me to come home. I was here then, and Captain Davey, he traded the work off on me, he not being an owner of her, and he thought I ought to do the work and he would help me?

Q. Did you go to see any wrecking companies.

A. I did.

Q. Who did you go to see and when?

A. I went to see the Merritt Wrecking Company.

Q. When was that, do you remember?

A. The fifth of September, that was.

Q. Where were they?

A. They were over in New York.

Q. What did you go there for?

A. I went there to try and get them to raise the vessel, to get her off.

Q. Did Mr. Endicott prior to that time have any communication with them?

A. Yes; he had been corresponding with them before that time, but he knows about that.

Q. He had made an arrangement with Capt. Drury, of that company, to get a bid from them, had he—Mr. Endicott?

A. Yes, sir.

Q. What did you do; what did they do, give a bid?

A. We talked the matter over, and they wanted to know the condition—

Mr. WILSON: That is objected to as immaterial, incompetent, and hearsay.

323 The WITNESS (continuing): —of the vessel and the best way of getting her off.

Mr. WILSON: Objection to both question and answer.

The WITNESS: And they would look at it and send a man to examine her and give us a bid, but they were busy then and had many wrecks there and they could not do it right away. Anyhow the fact is, summed up, they never did it.

Q. And you never got a bid?

A. They sent a man up here to look at it, but never gave a bid.

Q. They never gave a bid?

A. No, sir.

Q. Why were they busy, Captain, at that time?

A. In the spring there had been some heavy storms; about the first of August I know there were severe storms along the coast, and where I was there had been a very heavy one; two or three steamers got ashore on the coast, and they had bigger fish to look after.

Q. They had bigger fish to look after?

A. Yes, sir; and they attend to that in preference to us.

Q. Was there any report made by them of difficulty in metting chains under the vessel?

A. Yes, sir.

Q. What was that?

A. The expert they sent there reported to them that she was lying on a rock, lying flat on it—that was the condition, I was telling you about that—and bulged up on the rock that shoved that part of her up, and they didn't have much of an idea that  
324 the stone could be pumped out of her, and that she would have to be raised by pontoons, and that would be a difficult matter to get chains under the bottom to fasten them to pontoons, so they looked at it in a pretty bad aspect, so much so that they never gave us a bid.

Q. Did they report to you that they could not get chains under her or not?

Mr. WILSON: Objected to as hearsay and immaterial.

A. That was when I was over there talking with them. They gave their version of their expert up there.

Q. Did they say whether they could or could not get chains under the bow or stern?

A. Yes; because she was fast on a rock. They could not get chains between the bottom and the vessel.

Q. Between the bottom and the vessel?

A. Between the bottom and the vessel.

Q. What was the next man you went to—what wrecker?

A. Chapman, his name is.

Q. You went to Mr. Chapman?

A. Yes sir; the wrecking company.

Q. The Chapman Derrick and Wrecking Company?

A. Yes, sir.

Q. What is this? Where are they from (handing paper)?

A. They are in New York.

Q. What is that, Captain, you have there?

A. I cannot read that writing without my specs.

(Mr. Hagner reads to witness.)

325 Q. Did you get that letter?

A. Yes, sir; I got it.

Mr. WILSON: Objecte- to as immaterial.

Mr. HAGNER: This letter is offered in evidence, to be marked "Libellants' Exhibit No. 1, Burnett."

#### LIBELLANTS' EXHIBIT NO. 1, BURNETT.

##### Chapman Derrick and Wrecking Co.

Derricks, steam lighters, and wrecking appliances for all kinds of heavy hoisting, transportation, and submarine work; open day and night; office, No. 70 South street.

NEW YORK, *Sept. 12th*, 1893.

Messrs. Endicott & Co., cor. Hudson & Morris Sts., Jersey City, N. J.

GENTLEMEN: Your favor of 8th inst. to hand. At present all our plant is busy on work about the harbour. If you are not in a great hurry we may be able to attend to your vessel in about a week.

Resp'ly yours,

CHAPMAN DERRICK & WRECKING CO.

WM. L. CHAPMAN, *Treas.*

Q. That letter, Captain, is addressed to Mr. Endicott?

A. Yes, sir.

Q. Do you know whether or not he had communicated with them, asking for a bid?

326 A. He had communicated before.

Q. Before his illness?

A. Yes, sir; we talked through the telephone considerably.

Q. After you received that letter did you see Chapman?

A. Yes, sir.

Q. What was the result of that?

A. Well, they were busy, and they could not — it right away. The great difficulty, as before, was the stone in the vessel.

Q. The crushed stone in the vessel?

A. They did not know how to get that out. They thought she would have to be raised just as she was with the stone in her.

Q. Did they say anything about whether the stone could be taken out with the pump, feeding it to the pump?

A. They were doubtful about it.

Q. They were doubtful whether they could feed the stone to the pump?

A. If they could have done that they would not use the pontoons.

Q. Did they make a bid?

A. No, sir.

Q. Who did you go to then, if anybody?

A. Well, that ends me. (Witness looking at paper handed him :) No.

Q. That is to you?

A. Well, I understood you, personally. I wrote to Scott in New London.

Q. And what is that, his reply?

A. Yes; his reply.

Mr. HAGNER: I offer this paper in evidence, to be marked "Libellants' Exhibit No. 2, Burnett."

327 Mr. WILSON: Objected to as incompetent.

#### LIBELLANTS' EXHIBIT NO. 2. BURNETT.

T. A. Scott, diver, wrecker, and contractor of all kinds of submarine work; tugs, lighters, and wrecking appliances.

NEW LONDON, CONN., *Sept. 8, 1893.*

Capt. Chas. Burnett.

DEAR SIR: Yours rece'd, and in reply will say I do not think it will pay me to go to Georgetown to get up the sch'r Ellen Tobin. I would have to take tug and lighter from here, together with necessary tools to work with. I would like to see you and ask you more questions, as you said nothing of her condition. I think I will be in J. C. on Monday; if so, will try to see you.

Yours truly,

T. A. SCOTT.

Q. Did he, in answer to that letter, come to Jersey City?

A. He did not.

Q. Who did you see next, Captain?

A. (Looking at paper.) I saw Capt. Davis.

Q. Who is he of?

A. Of New London.

Q. Of the New Bedford Wrecking Company?

A. Of the New Bedford Wrecking Company, and I was talking with him about it.

Q. When was that, do you remember; you said between the 10th and 11th of Sept.?

328 A. Yes, sir. He was busy, on his way to Charleston to raise a steamer or do something with her. Of course he could not go, and I asked him whether he could not come around and raise this one off and then go to Charleston; but he could not do it. I talked with him — the best way he thought of getting her up, because his judgment was good. He thought she might probably be pumped out and raised with pontoons.

Q. Now, did you communicate with any one else?

A. No.

Q. Did you communicate with the French & Cole Wrecking Co.?

A. Yes, sir: I kind of forgotten them. I met Mr. Cole here. I telephoned him when I got here to come up here and look over the situation, and he went away and he said he would give us a bid, and he did.

Q. That was the \$8,000 bid?

A. Yes, sir; the \$8,000 bid.

Q. Captain, your libel charges that all that you did, all that the libellants did, with respect to the Ellen Tobin was done in good faith?

A. Yes, sir.

Q. Is that true?

A. It is true; yes.

Mr. WILSON: Objected to as leading and incompetent.

Q. Were you acting in good faith in all you did in respect to getting up the vessel and selling the stone and saving the vessel?

A. We done the very best thing we thought we could do for all concerned in the whole business. We got her off just as soon as we possibly could get her off.

Q. Did you realize that either you or the Messrs. Smith  
329 would have to pay those expenses?

Mr. WILSON: Objected to as immaterial and irrelevant.

A. We were sure that one or the other of us had to pay it.

Q. Were you as economical in that respect?

A. We could not be more economical if we had to pay the whole concern. I doubt whether anybody could have done it better.

Cross-examination.

By Mr. WILSON:

Q. What time in August did you come to Washington?

A. (Looking at book.) Well, I think it was the 10th. Well, hold on a minute, it was the 10th of August that I came to Washington, but I don't think I seen the schooner until the 11th of August; that is the time I saw the schooner. I stayed over night, though I am not certain about that, whether it was the 10th or 11th I saw her. I am not positive. One of those two, at any rate.

Q. At that time did you see Mr. Smith?

A. I seen him at the time I was there.

Q. Which one?

A. The young man. The old gentleman I never saw.

Q. Where did you see Mr. Smith?

A. I saw him at Mr. Lee's store.

Q. Did you have any conversation with him?

A. Yes, sir; I did.

330 Q. Did you make any proposition to him to take the vessel and pay you any money?

A. Yes, sir.

Q. What was it?

A. I told Mr. Smith—now I was acting on my own responsibility, Mr. Endicott said—I told Mr. Smith this: that we had come there to take in the situation and that we believed he was responsible, but we didn't *was* any law. We had law enough in our time; I had; and if he had a proposition to offer on a compromise we would consider it, but he didn't offer anything. Then I asked the privilege of Mr. Endicott to let me make a proposition, so he agreed to it. I told him that vessel was worth \$10,000, and to waive all questions of lawsuits and to make a compromise we would take 50 per cent. of that ten thousand dollars and give him the vessel, tackle, and everything as she was if he would accept that. The answer was that he would consider it, and if I would wait an hour and a half he would let us know. Well, he went to see his lawyer, and of course he told him he had a good case and he came back and he was a different man. He said, I haven't anything to offer. Mr. Smith, he said, No. So I said, Mr. Endicott we will put him to it. Our mission was ended and we went home.

Q. Did you name any specified sum you would take for her?

A. Well, I named it.

Q. What was it?

A. I told you we would compromise for \$5,000.

331 Q. You said fifty per cent. I asked to know what you meant. \$5,000 was the sum you mentioned.

A. 50 per cent. of ten thousand dollars.

Q. What, if anything, did you say at that time about the fault on the part of your employees or those in charge of the vessel?

A. I don't remember saying anything about any fault?

Q. Did you say there had been fault on both sides?

A. No, sir.

Q. Or words to that effect?

A. No, sir; I didn't say any such thing. I never said a word of it.

Q. Did you say anything about the cause of the accident?

A. I did not. I said then what I found to be that vessel on the rock on his ground.

Q. Did you say anything about leaving the vessel there?

A. I did not know we were bound to take her off, and I said we will abandon her then, but we soon ascertained we had to take her off. Then we gave that up and went to get her off.

Q. And you said to Mr. Smith you would abandon her there?

A. We said we would abandon her there. I thought we were justified and I didn't know any better, but I found the law did not allow us to do that.



Q. When did you find that out?

A. Very soon afterwards.

Q. How soon and from whom?

A. I asked somebody that knows more than I did.

Q. When and from whom did you find that out?

332 A. That I cannot tell you. A good many I found out by. We have good lawyers in New York and a good many other places that told me that. They told us that up at the War Department.

Q. Did you go to the War Department?

A. I sent a man there?

Q. For what purpose?

A. To see if they could not assist us or do something for us. They treated us like gentlemen. They said they were not disposed to injure anybody that was already injured, and that we should do the best we could to take the vessel off.

Q. When did you get that notice from the War Department?

A. We didn't get any notice. We sent to inquire of the men up there.

Q. How did you come to send a man to the War Department?

A. I wanted their sympathy and their knowledge.

Q. How did you know the War Department had anything to do with that?

A. We found that out, that they had the inside navigation. Some lawyer, I suppose, told me that. That is all the way I know—from lawyers. We did not want lawsuits in it at all. If Mr. Smith felt as I did, he would not have any law.

Q. You had your own experience in law?

A. I thought Mr. Smith would have money in his pocket the same as we would if we did not have any law.

Q. Were the accounts of the earnings of the vessel rendered to you every year by the managing owner?

333 A. Oh, no; I could not tell every year.

Q. Do you know what the net earnings were for the year prior to her loss?

A. Mr. Endicott can tell you that. I cannot tell you; I don't know.

Q. You don't know?

A. I know at home. I don't know here.

Redirect examination.

By Mr. HAGNER:

Q. Do you know what the earnings of the Ellen Tobin were for the past five years?

A. I know that; no, I don't know that. I know it at home. Mr. Endicott knows all about it.

Q. From your accounts?

A. My accounts and Mr. Endicott's is the same. We know it.

Q. What per cent. did the Ellen Tobin yield for the last five years, approximately?

A. Well, she yielded a little over twenty per cent. net.

Q. On what?

A. On her value of \$10,000.

Recross-examination.

By Mr. WILSON:

Q. You remember saying to Mr. Smith at the time you refer to that if this case went into court the judge would probably find both parties to blame?

333½ A. I don't remember any such thing. I don't remember any such thing. The fact is I didn't hear it.

(Mr. HAGNER:)

Q. Did you say it?

The WITNESS: No; I didn't say it.

(Mr. WILSON:)

Q. And did you give that as a reason for offering to take 50 per cent. of the value?

A. I gave the reason. Waiving your question, I will answer it in a different shape. I have had lawsuits before and if I win I lose, and if I don't win I lose, and if I can make anything of a reasonable compromise without going into court I do not go. That is about the meaning, I guess. You can get it. I might have talked that to Mr. Smith or something of that sort.

CHARLES BURNETT.

Sworn and subscribed before me this 1st day of March, A. D. 1894.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

WEDNESDAY, Mar. 7th, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same counsel as before (except Mr. N. Wilson) and—

WILLIAM R. TAYLOR, a witness produced on behalf of the libellants, having been first duly sworn, deposes and says:

By Mr. HAGNER:

Q. Please state your name, age, residence, and occupation.

334 A. My name is William R. Taylor; occupation, tugboat-ing on the river; age, 56; residence, 108 North Washington St., Alexandria, Va.

Q. Captain, did you ever know the schooner Francis A. Biard?

A. I saw her once—I believe once. I am not personally acquainted with her.

Q. What did you do with her?

A. I took her from Blackistone's island to Mayfield and Hieston's wharf.

Q. When was that, Captain?

A. I could not tell the date. It was winter before last; before Christmas some time.

Q. When did you see the Biard again?

A. I saw her several times; I saw her lying at the wharf while I was passing up and down.

Q. Did you see her subsequent to that at Mr. Smith's wharf?

A. I think I saw her at Mr. Smith's wharf.

Q. At what point was she opposite Mr. Smith's wharf?

A. I think she was opposite the stone-crusher.

Q. What did you do with her, if anything?

A. I took her away from that wharf and took her to Alexandria; took her to Mr. Smoot's wharf, at Alexandria.

Q. What was done at Mr. Smith's wharf by you?

A. Well, I took his hawser and took him from Mr. Smith's wharf and took him to Alexandria.

Q. Was she on anything when you——

A. When I first "tauted" her hawser she seemed to be touching something. I suppose it was the ice, and the tug Templar came up and broke the ice.

335 Q. What became of that hawser that you had on her, then?

A. I parted that hawser.

Q. That hawser parted?

A. Yes, sir.

Q. They what did you do?

A. I think, as well as I recollect, I gave him my own hawser.

Q. Then what did you do?

A. I went ahead with her.

Q. What then?

A. When we pulled on her she came off.

Q. Do you know how much water she drew?

A. I do not.

Q. Do you know how much water she drew when loaded?

A. I do.

Q. How much?

A. When I drew her up the river she drew 14 feet, so the captain told me. What she drew when I took her from Mr. Smith's wharf I don't know.

Q. Did you know of a rock being in front of Mr. Smith's wharf at that place?

A. All I know about the wharf is, when I first took charge of Capt. Bell's boat he told me there was a rock there; that is all I know about it.

Q. Did you know you were on a rock when you took her off?

A. No, sir; I did not.

Q. How did you avoid the rock?

A. Capt. Wm. E. Bell told me if I put a vessel in there always to go close to the wharf. We put a great many vessels there,  
336 but most of the vessels I towed there were light-draught vessels.

Q. As I understand you, you say that the first hawser that was given you was given you from the Biard?

A. Yes, sir.

Q. And that hawser was parted in tugging to pull her off the obstruction she was on?

Mr. BARNARD: I object to that, as the witness said there was no obstruction there except the ice, and the question is improper.

Q. Did you have it in your mind that there was a rock there when you fastened your hawser to her?

Mr. BARNARD: I object to that question.

A. No, sir.

Q. If it had occurred to you that there was a rock there what would you have done?

Mr. BARNARD: That is objected to as incompetent.

A. What would I have done? I should not have done anything.

Q. Why not?

A. I should have left the vessel probably where she was.

Q. Why would you have done that; what would you have been afraid would have happened?

A. I would not pull on any vessel that I thought was on anything, as I might damage the vessel, and they would hold me responsible for it.

337 Q. In other words, you would have been afraid of pulling the bottom off?

A. If the captain said, "She is ashore and on the bottom; go ahead," I will pull on her.

Q. Now, have you any doubt in your own mind that that vessel was on an obstruction when you pulled on it?

Mr. BARNARD: I object to that as incompetent and leading.

A. Well, gentlemen, that is a pretty hard question for me to answer in ice times. It is astonishing sometimes how ice will hold a vessel. I would not like to say there was anything but the ice; I would not like to say there was anything around the vessel but the ice.

Q. Do you know who paid the towing bill on the Biard?

Mr. BARNARD: That is objected to as incompetent and irrelevant.

Q. Do you know whether or not Mr. Smith paid the towing bill?

A. Mr. Smith never paid me any money.

Q. Do you know whether or not Mr. Smith paid the man who paid you? Who did pay you?

Mr. BARNARD: Objected to as wholly incompetent.

A. It has been so long ago I really could not say. I towed the schooner down and we did not get any money from the captain, but he said the money would be sent to Mr. Lee's store. We didn't collect any money below.

338 Q. You didn't collect any money from the schooner?

A. He said the money would be sent there by Captain Lee when he got to Norfolk—Old Point.

Q. You said you always kept in close to the wharf when you took vessels in there, Captain?

A. I was supposed to keep in pretty close to the wharf. Those were my orders, and the object of that was that Capt. William E. Bell thought there was a rock lying off aways from the wharf when I first taken charge of his boat.

Q. And that is the reason you always took vessels close to the wharf when you took them in there?

A. Yes, sir.

Q. How long ago was it you knew of this necessity of putting vessels in at that wharf in that way?

A. I suppose it has been in the neighborhood of 18 years ago.

Cross-examination.

By Mr. BARNARD:

Q. Did you ever have any experience with any obstruction in the river at this place yourself, Captain?

A. You mean on this rock?

Q. On this supposed rock.

A. Well, I struck something there one day with a vessel. I supposed there was a rock there; probably that was what I hit. I don't know. She struck something there.

Q. Did you ever make any soundings there to ascertain what was in the river at that point?

339 A. I never did.

Q. What size vessels have you taken in and out at this wharf?

A. Vessels drawing from 10 to 11 or 12 feet.

Q. And this one that drew 14?

A. I didn't put her there.

Q. You took her away from there?

A. I took her away from there.

Q. What was she drawing?

A. I don't know.

Q. You only knew what she drew when she came up, according to the captain's statement to you?

A. That is all.

Q. And you are not prepared to say she was aground on the bottom?

A. There was something held her, but I could not tell whether it was the bottom or what it was.

Q. After the ice was broken did you have any difficulty in pulling her off?

A. As I said before, I gave her my hawser and went ahead with the vessel and had no more trouble with it.

(Mr. HAGNER :)

Q. After the ice was broken this happened?

A. When I went ahead with her.

(Mr. HAGNER :)

Q. It was after the ice was broken you parted your hawser, or was it before the ice was broken?

A. When I parted the hawser the ice had not been broken, as far as I recollect.

By Mr. BARNARD :

Q. Captain, about how thick was the ice at that time?

340 A. I really could not tell you. It was about the first hard frost. I could not tell, it has been so long, about the thickness of the ice. I don't recollect.

Q. How long ago was it this occurred?

A. This past winter—Christmas a year ago.

Q. How long have you been running up and down the Potomac river?

A. I have been running tugboats up and down the Potomac river since the war closed.

Q. And you have frequently been above this wharf of Mr. Smith's?

A. Yes, sir.

Q. And all about there?

A. Yes, sir.

Q. Have you ever heard any one else say that there was a rock in front of this wharf except Capt. Bell—any of the rivermen?

A. I don't know. I cannot say I have.

Redirect examination.

By Mr. HAGNER :

Q. You say you got another vessel on there, Captain. What was that?

A. I have answered that, sir.

Q. What vessel was that?

A. What vessel I touched something with? It was the Frederick Fish.

Q. Did you get the Mary Lewis on there?

A. No, sir; I did not get the Mary Lewis on there.

Q. How much did the Mary Lewis draw?

341 A. As near as I can recollect, she drew 6 feet.

Q. And the Fish, what did she draw?

A. I could not tell you; I cannot recollect.

Q. Was she a tug?

A. No, sir; a vessel.

Q. Was she a schooner?

A. Yes, sir; a two-masted schooner. She touched, but I am unable to say what it was.

## Recross-examination.

By Mr. BARNARD :

Q. Whatever she touched, did it injure her any ?

A. No, sir.

Q. She just simply touched something ?

A. Yes, sir.

By stipulation the testimony of this witness is signed by me for him.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

At the same time and place and in the presence of the same counsel also appeared GEORGE W. DAVIS, a witness produced on behalf of libellants, —, being first duly sworn, testified as follows:

342

By Mr. HAGNER :

Q. What is your age, residence, and occupation ?

A. My age is 36 ; I live in Alexandria ; occupation, steamboat pilot.

Q. Did you know the schooner Francis A. Biard ?

A. I seen her one time.

Q. When was that ?

A. Lying in front of Mr. Smith's stone-crusher.

Q. When was that ?

A. On the 28th day of last December.

Q. Last December or the December before that ?

A. Last December a year ago.

Q. Will you tell what was done in regard to that vessel ?

A. That is all I can tell. We left Alexandria with the tug Templar to come to Georgetown. We came up to Georgetown and tied up at the Transparent Ice Company's wharf. We came from Alexandria and tied up to the dock. The Harlow came up just ahead of us. We passed pretty close by the side of the vessel, both boats.

Q. What boat ; the Biard ?

A. Yes, sir.

Q. What happened then ?

A. Capt. Taylor and Chester went ahead.

Q. Who is this Capt. Chester ?

A. Capt. of the Templar. They stayed only a very few minutes. They were going to tug the schooner away to Alexandria ; tug her out of there.

Q. Was there anything said then about her being on anything ?

343 A. Not as I heard. We let go from the dock and went over to the schooner and around and got by her and down by her again.

Q. What was the object of that ?



A. To crack the ice up. Then Capt. Taylor turned round and backed in and took his hawser.

Q. Well, what then?

A. Well, he went out with his hawser and tugged a while, and the hawser gave way.

Q. What happened then?

A. Then we turned around and gave it another crack.

Q. Then what happened?

A. Then he backed back and gives the schooner his hawser.

Q. What became of the first hawser?

A. The first hawser was from the Biard and it parted, and one end was pulled in aboard the schooner and the other part aboard the tugboat. Then he backed back and gave him his hawser.

Q. Then what happened?

A. Then she went out and tugged on it and the schooner came off.

Q. Were there any lighters lying between the Biard and the wharf at that time?

A. I would not like to say positively that there were.

Q. Was there one or more?

A. I could not say. To the best of my knowledge there was one lighter, but I could not be positive about that.

Q. Can you be sure there were not two lighters there?

A. Yes; I can be sure there was not two.

Q. Was the Biard lying pretty close to that lighter that was there, or was it some distance?

344 A. There was a space between the Biard and the dock.

Q. Between the Biard and the lighter?

A. Yes.

Q. How far, about, was it?

A. I could not tell you, because I didn't pay much attention to it. That is about all I know of it, sir.

Cross-examination.

By Mr. BARNARD:

Q. What was the business that the Templar was engaged at that time?

A. We were working both boats in partners.

Q. In the general business of hauling vessels?

A. Yes, sir.

Q. What position did you occupy on the boat, the Templar, at that time?

A. I was mate of her at that time.

Q. Did you break any ice between the schooner and the shore at that time?

A. Inside the vessel?

Q. Yes.

A. No, sir.

Q. You broke ice on both ends and on the outside?

A. We came up by her tugging the schooner.

Q. Whatever ice was between her and the shore had to be broken by the hawser?

A. I could not get in between her and the shore to break the ice.

Q. If the schooner had been frozen in you did not break the ice. You didn't go in between the schooner and the shore?

A. No, sir.

345 Q. How long have you been on the river?

A. I have been on the river 20 years. I have been steam-boating 10 years, I guess.

Q. Have you been familiar with this wharf before?

A. I cannot say I am very familiar with the wharf, only passing up and down. I never pulled a vessel there.

Q. Did you ever hear of any sunken rocks there in the district?

A. I never heard of any rocks there.

Q. Captain, are you sure that there was a lighter there between the schooner and the wharf?

A. I won't be positive.

Q. The schooner may have laid up next to the wharf—that is, within two or three feet of the wharf?

A. I am positive the schooner laid off from the dock, because we went in ahead of the schooner to the Transparent Ice Company's wharf, and we could see a space in between the wharf and where the vessel lay.

Q. So she did lay out from the wharf?

A. Yes, sir.

Q. About how many feet?

A. I could not say how many feet. I know there was a space, but how many feet there was I could not say.

Redirect examination.

By Mr. HAGNER:

Q. Could you say whether there was space to put in a twenty-foot lighter between the vessel and the wharf?

A. I would not like to say positively, but I think there was.

By stipulation the testimony of this witness is signed by me for him.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

346 The taking of this testimony is here continued to Wednesday, March 14, 1894, at 3 p. m.

MARCH 14, 1894.

Met pursuant to last-noted adjournment, and, no witnesses being present, case is adjourned to March 21, 1894, at 3 p. m.

347 WEDNESDAY, March 21, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same counsel.

Whereupon WILLIAM COLEY, a witness produced on behalf of libellants, being first duly sworn, deposeth and saith:

By Me. HAGNER:

Q. Captain, please state your age, residence, and occupation.

A. Age, 53; reside at Norfolk; business, wrecker employed by the Merritt Wrecking Organization; and I am familiar with the business of raising wrecks. I have been in that business twenty-seven or twenty-eight years.

Q. Where were you on or about the 30th day of August, 1893, Captain?

A. In Georgetown.

Q. How did you happen to come there?

A. To examine the schooner sunk.

Q. Do you remember her name?

A. The Ellen Tobin.

Q. What did you examine her for?

A. To see what I could raise her for; what was the prospect and what could be done.

Q. When you made your examination, in what condition did you find her?

A. I found her decks shoved up about three or four feet amidships.

348 Q. What plans had you for raising her?

A. Pontoons. The prospect of pumping her out was very poor, as the decks were very far up—shoved up between three and four feet. Her bottom was shoved up the same and the prospect of pumping her was very poor, and also she was full of stones, and we could not get big pumps down into her.

Mr. WILSON: That is objected to as immaterial.

Q. Captain, as an expert wrecker, what was your opinion as to her condition then as to saving her?

A. She was not worth saving. The expense would be more than we could realize from her if she was thrown on our hands for raising her.

Q. What was the condition of her sides?

A. Very fair.

Q. What would that indicate in connection with the decks being shoved up in the way you state, three or four feet?

A. Well, that there was something under the center of the vessel.

Q. Did you sound around her?

A. I did, sir, about avery five feet.

Q. For what purpose?

A. For the purpose of seeing if there was any obstruction to hinder us getting chains under her for the purpose of raising her with the pontoons in case we took the contract for raising her.

Q. What was your conclusion, from your examination of her, as to whether you could get chains under her?

Mr. WILSON: I object to that as immaterial.

349 A. You could not get chains under her, as she was on the level rock, the bed rock.

Q. Did you or not make any estimate as to what it would  
26—582

cost to raise her with the stone in her with pontoons, as you have stated?

A. I estimated it would cost five thousand dollars to raise that vessel.

Q. Did you estimate how wide the draw of the Long bridge would have to be to get her with the pontoons alongside of her through the draw?

Mr. WILSON: Objected to as incompetent and leading.

A. I found that the boxes would not go through alongside the vessel—that is, the boxes were bigger than the draw. The draw was somewhere over sixty feet and the boxes would require about sixty-seven or eight feet, all depending on how much they heeled. Sometimes they will heel and make a foot or more.

Q. By boxes what do you mean?

A. Pontoons. Sometimes we term the word box and sometimes pontoon, for we have different kinds.

Q. Can you tell us how long a vessel will live if she is properly kept up in good repair?

A. It depends on what kind of repair you want to put on her, sir. She may live for thirty or forty years.

Q. Do you know of any vessel forty years old now in use?

Mr. WILSON: I object to that as immaterial.

A. I believe we have some in the company thirty or forty years old. I could not tell exactly. They are owned by the Merritt Wrecking Co.

350 Q. Captain, in your experience as a wrecker have you had occasion to become familiar with the use of dynamite?

A. Some.

Q. Can you tell us whether if there is a rock on the bottom of the berth at Mr. Smith's wharf it would or not be possible to blow that rock out with dynamite without injury to the wharf or surroundings there in Georgetown?

Mr. WILSON: Objected to as immaterial and incompetent.

A. Only from experience with what we use around vessels when we work on them. We blow rocks out from under them and it does not seem to damage the vessel any as we have seen. I have done it. I have done it this winter under iron—blown the rock from under an iron vessel this winter.

Q. Do you say whether it can be done or not?

A. It can.

Q. Can it readily be done?

A. Yes, sir.

Cross-examination.

By Mr. WILSON:

Q. At whose request did you examine the Tobin?

A. At the Merritt Wrecking Co.

Q. By their directions?

A. Yes, sir.

Q. You belong to the company?

A. Yes, sir.

351 Q. You are a member of the company?

A. An employee.

Q. What are your duties as an employee of the company?

A. Well, I have several different duties to perform; some is, I do the contracting for them and do the work under the contract. Sometimes I contract in New York city and do the work after they make the contract.

Q. Is the company in business now?

A. Yes, sir.

Q. Whom did you see at the time you made the examination on the vessel?

A. I saw the captain, a man who represented himself to be the captain, and the mate of her.

Q. And the day was the 12th of August?

A. I could not say the exact date.

Q. As near as you can recollect state what the date was?

A. It was in or about the last of August.

Q. Did you make any measurements as to the position of the vessel, her distance from the wharf or shore?

A. I judged her distance from the shore was eighteen feet. There was room enough to get the boxes inside, as they were sixteen feet, and when I got close to the wharf I found it went a little slanting down, and I think there would be a margin of three feet.

Q. Did you measure the distance?

A. Yes, sir; I did measure it, but I could not tell — positively than that there was more than sufficient to get a sixteen-foot pontoon inside her there so as to get ten feet of water there so as to submerge the pontoon.

352 Q. Did you make any memoranda of the measurements?

A. I did at that time.

Q. Have you got it?

A. No, sir; I have not.

Q. What became of it?

A. I don't know what became of it now.

Q. Did you measure the depth of the water between the vessel and the wharf?

A. Yes, sir.

Q. What was it?

A. I could not tell you now; it has slipped my memory.

Q. You have no recollection about it at all?

A. I have a faint recollection; I think it called for twelve feet forward on the rock—that is, by the things we measured with to know the depth of the water.

Q. What was the depth of the water at the time you measured?

A. Fourteen feet.

Q. Fourteen feet where?

A. Fore and aft.

Q. Did you measure anywhere else?

A. I measured between that and the dock.

Q. What was the depth there?

A. There was enough there so we could get the boxes down ten feet.

Q. How many feet would that make the depth?

A. That would make it ten feet.

Q. You mean to say there was only ten feet in depth?

353 A. The box, you understand, would go down slanting from the edge of the dock.

Q. Then you don't know and just guess it?

A. The bottom from the deck outside of the vessel was sixteen feet over her side. I could sink the box her full capacity between her and the dock. There was one box ten feet and another sixteen feet which we would have to submerge to their deck.

Q. And the bow and the stern were fourteen feet?

A. About fourteen feet.

Q. Was the bow of the boat resting on the bottom or on a rock?

A. She rested, as near as I could tell, fore and aft on a rock as it went to the stern about two feet, between two and three feet; as it went towards the vessel's stern, the rock lay two or three feet deeper than it did at her bow. Measuring the level of the mud there was about two feet of mud on it aft and one foot forward.

Q. I asked you if the bow, as you understood it, was resting on the bottom or on the rock.

A. On the rock, as near as I could tell from sounding.

Q. And the stern?

A. Also the stern.

Q. You mean to have it understood that the entire keel was resting on the rock?

A. Yes, sir; both of the ends. Both ends of his keel was, because there was nothing under; it rested all along on this rock.

Q. Was there anything under it?

A. I could not tell that.

354 Q. What effort did you make to put any chains under her?

A. I didn't make any. I didn't have occasion to.

Q. You concluded it was impossible?

A. Yes, sir.

Q. What was the length of the vessel?

A. I could not say, sir.

Q. About?

A. I have no idea.

Q. Can you give us any idea according to your best recollection?

A. About 140 feet.

Q. About 140 feet?

A. I don't know; more or less.

Q. And the whole of her, then, 140 feet, was on the rock?

A. Yes, sir; I think so.

Q. What makes you think so?

A. Because I measured the vessel at that time outside her rail and measured down to the rock fore and aft and found it all just alike.

Q. Now, will you state more definitely exactly what measurements you made, beginning at the bow?

A. I could not tell you now.

Q. As near as you can?

A. Well, as near as I can, we found about twelve feet forward before we reached this rock from the water's edge and about fourteen feet aft before we reached the rock.

Q. That makes two measurements?

A. Yes, sir.

Q. Did you make more than two?

A. I measured her every five feet on the rail from stem to stern, but I did not tally every measurement; only just took my own head for my opinion.

355 Q. Was it uniform?

A. It appeared to be uniform; sometimes I struck small stones before I struck the bed rock.

Q. Before you struck the bed rock?

A. Yes, sir.

Q. What was the greatest distance to the rock where you measured at any one place from the surface of the water?

A. I think about fourteen feet.

Q. When you made your report, to whom did you make it? Did you make any report?

A. Yes, sir; I made a report.

Q. To whom?

A. Mr. Seymour, in Norfolk.

Q. What in, in writing?

A. No, sir.

Q. Verbal?

A. Verbal; yes, sir.

Q. What was that report?

A. As I stated to you now as near as I can.

Q. What was that? State as near as you can exactly what your report was.

A. As near as I can, she lay on level rock fore and aft, with the exception that the rock lay two feet deeper aft, and the vessel apparently fitted the rock all the length along, stern, middle, and bow, so it would be impossible to get chains under her.

Q. Did you make any other report?

A. No, sir.

356 Q. Did you make any report of the cost of raising her?

A. They asked me my opinion.

Q. Do you know what became of the vessel?

A. No, sir; I do not.

Q. You never saw her after that time?

A. I never saw her after that time.

Q. Have you any opinion from your examination of her whether it would be difficult or costly to raise her after the stone would be taken out?

A. What the stone would cost, that would be the main cost on us.

Q. What did you estimate the cost of getting the stone out?



A. I never made any.

Q. How did you make up your mind it would cost five thousand dollars?

A. From experience with other vessels.

Q. Of what items did that cost of five thousand dollars consist?

A. That would be impossible to tell. We use a great deal of material, pumps, pontoons, steamers, and barges.

Q. You say it would cost five thousand dollars. I want to know how you get at this figure, how you make the total.

A. The greater portion of wrecking business is guess-work. You cannot make an accurate estimate on it.

Q. And in guessing you always allow yourselves a good margin?

A. Well, we try to get something out of it like anybody else.

Q. You cannot say how your estimate of that cost, five thousand dollars, is made up, any more definitely than you have?

A. Well, we have to have steamers. Steamers are worth \$100 a day, and pumps, we calculate on that. The steamers cost a \$100 a day, and pumps and boilers we hire them by the day from \$30 to \$40 a day, and pontoons we cannot make much of an estimate on them.

357 Q. You own them?

A. Yes, sir; we own them.

Q. Steamer, too?

A. Steamer, too; yes, sir.

Redirect examination.

By Mr. HAGNER:

Q. What did you sound with?

A. A rod.

Q. What kind?

A. An iron rod; iron or steel. I don't know what it was. It was a rod, anyway.

Q. You speak of desiring to sink the pontoons at least ten feet deep—the boxes or pontoons. The object of sinking them was what?

A. They sink these boxes—submerge them level with the water and lift them. If the shoals is ten or twelve feet, usually twelve feet, in order to sink them down we have to have twelve-foot boxes and we have to have twelve foot of water to let them down.

Q. You sink them?

A. We sink them.

Q. And then, the pontoons being sunk on each side of the vessel, what do you do?

A. They have chains goes under them, some have four and some have six, like sectional docks—come under the vessel into these boxes; then we pump the boxes out and the boxes come up and the vessel comes with it.

Q. The boxes as they are pumped out raise and the vessel swung on the chains comes with them?

A. Yes, sir; on the sectional dock.

358 Q. Suppose you had succeeded in doing that, you would then have had the vessel with the stone in her afloat?

A. Yes, sir.

Q. How could you then have gotten the stone out?

A. We would have to dove it out—pump it out. We could not get it through the bridge, as the boxes were too large.

Recross-examination.

By Mr. WILSON:

Q. Did you consider the possibility of getting the stone out separately first?

A. We did not want that kind of work; it is too costly.

Q. Suppose this stone had been taken out, and supposing the cost of taking the stone out of her was \$1,200 or thereabouts, how much in addition would it have cost to raise the vessel?

A. It would all depend on circumstances, sir, in regard to what way the vessel can be raised and what appliances we would have to get to raise her. You would have to try each one, in all probability, the way you look at it—the way the deck of that vessel is. Most men of our experience would say she cannot be pumped out, as this break is in a space of twelve feet and the deck shoved up four feet, and the bottom, of course, would be the same as her deck.

Redirect examination.

By Mr. HAGNER:

Q. What would be the tendency of the vessel after the  
359 stone had been taken out? What would be the tendency of the bottom of the vessel as she was raised up?

A. The bottom would naturally go and sink to its natural condition.

Q. To its natural rounded condition?

A. Yes, sir.

Recross-examination.

By Mr. WILSON:

Q. If the testimony shows or if it is a fact in this case that the stone was taken out at a cost of \$1,200 and the vessel was raised by pumping in about an hour after that or less than an hour after that, would you not consider five thousand dollars rather an extravagant estimate?

A. No, sir; that is the discovery they could not know anything about; just the same as I would have to come and bring my plant up here and find that out.

Q. To find what out?

A. To find out whether she could be pumped or not. It would not pay me to go back to Norfolk on the steamboat again and wait three days again and come up with other materials if I fetched pumps in the first place.

Q. Then the difference between the five thousand dollars and the twelve hundred dollars and the cost of about an hour's work would

have been what they would have to pay for knowing what the real trouble was?

A. Yes, sir; no man can tell till he tries in regards to a wreck.

Q. It is a mere opinion you form about that?

A. We all form that.

360 Q. But can you form any opinion as to what the cost of the hour's work in pumping would be after the stone was out? Supposing they pumped the stone out and she was raised in an hour, what would be a fair allowance for the cost of that?

A. It would be a day's work, I suppose.

Q. How much would that be?

A. It would all depend on where you get your pump. If you get your pump from New York, you would have to pay more for a pump than if you got it from somebody at Norfolk, and you would pay more for getting the pump at Norfolk than if you got it at Washington.

Q. How much would that be if you got it from New York?

A. According to the size of the pump; all the way from \$25 to \$100.

Q. It could not have been over a hundred dollars?

A. It depends on how you get the pump here and where you get it. If I had a pump here and you wanted it, it would cost you \$30 a day.

Q. If you brought it here from New York and it was the best pump you could get and it took a week, what would it have cost?

A. \$40 a day.

Q. Five hundred dollars would cover the whole thing at the outside?

A. Yes, sir.

Q. That would be a liberal allowance?

A. Yes, sir.

Redirect examination.

By Mr. HAGNER:

Q. Now, it is in evidence here by the man who pumped the stone out that it took him a week to get ready, and that it took 3 pumps to pump the water out of her and keep it down? How much would it then cost?

361 A. I don't know, sir. You are a better figurer than I am.

Q. Then, if it took three pumps, one throwing an eight-inch stream and two others throwing a four-inch stream each, and it took a week to get ready, all these items have to be counted in the cost, don't they?

A. Yes, sir.

Q. Now, Captain, give us, as a wrecker, your candid opinion and unbiased opinion as to whether or not, from what you know of the business, the sum of \$1,200 for pumping the stone out and \$40 for getting it on the wharf and giving the vessel itself, minus \$100 for raising her, was or not a cheap job.

A. I would not like to do it for it, sir. It takes us five days and

do our best to come here and back and move our material in and out on the boats—between four and five days and not do any work—that is, to leave Norfolk and put on coal and get it ready and three or four pumps and come up here and get it ready for to run. Four days would be the best we could do it.

Q. What do you consider would be the value of the dunnage or whatever you call it, the fittings, and the hull of the Ellen Tobin at the time you saw her there?

A. The fittings of her?

A. The wreckage, you may call it, I suppose, and sails.

A. I don't know.

Q. You have no idea?

A. I have no idea. It is out of my line of business.

It is stipulated and agreed by counsel that the examiner may sign the witness' name to the above deposition.

WILLIAM COLEY,  
By RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

362 At the same time and place and in the presence of the same counsel appeared CHARLES G. ENDICOTT, who, being first duly sworn, testified as follows:

By Mr. HAGNER:

Q. What is your business, Mr. Endicott?

A. Ship-chandler.

Q. What else?

A. Ship-owner and manager of vessels.

Q. State your residence.

A. My residence is Westfield, N. J.

Q. Where is your business?

A. Jersey City, N. J.

Q. What is your age?

A. Fifty-five.

Q. Who was the managing owner and ship's husband of the Ellen Tobin?

A. I was.

Q. How long had you been such?

A. About eight years.

Q. For the past eight years prior to August last?

A. Yes, sir; prior to August last.

Q. Who had been before you?

A. Charles Burnett.

Q. Did he continue such for awhile after you really did the work?

A. He was nominally the managing owner for awhile after I took charge of her business. I was not entered on the papers for awhile after that.

363 Q. He was getting old?

A. Yes, sir; I took charge of the vessel and I didn't care to displace him for a while.

Q. Because of his age?

A. Yes, sir.

Q. Now, Mr. Endicott, state how many masts the Tobin had and give their names and localities, beginning from the bow.

A. She had three masts—the foremast, nearest the bow; the mainmast, in the middle—in the center nearly—and then the mizzenmast, aft.

Q. What was her carrying capacity for outside navigation and inside navigation?

A. She carried ordinarily from 560 to 580 tons for outside navigation.

Q. What was the largest cargo you know of her having carried outside?

A. Five hundred and ninety-seven tons.

Q. Of what?

A. Of coal.

Q. When was that, sir?

A. I think that was in August, 1886, taken to New Haven.

Q. What was her character as a vessel prior to her injury at Georgetown?

A. She was a vessel well found and fitted and in good condition.

Q. When did you see her last?

A. I think in February.

Q. I mean by that prior to the injury.

A. I think in February, 1893.

Q. Was she out for the winter?

A. She was laying up near my store.

364 Q. When was she taken out?

A. She went out the latter part of February. I think, probably, just after Washington's birthday. That is about when we start them out.

Q. Did you see then what was her condition?

A. She was in good condition; well fitted for the business she was engaged in or going to be engaged in.

Q. How about her staunchness?

A. We considered her staunch and strong and perfectly seaworthy and everything like that.

Q. Had she been overhauled or not?

A. Yes, sir. Not in 1893, she was not. She was in 1892 and 1891 and 1890 and so on back.

Q. Was she looked over in February?

A. Well, I was aboard of her in February and looked her over and saw her condition before she started out for her work.

Q. Where was she built, Mr. Endicott?

A. She was built in Kennebunk Port, Maine.

Q. When?

A. I think she was launched in the season of 1874.

Q. Who built her?

A. Nathaniel Thompson.

Q. For whom?

A. There were a number of owners. There was Charles Burnett and myself and probably ten or twelve others. I just don't recollect all the original owners now.

Q. Have you any certificates of her ratings there, Mr. Endicott?

A. Yes, sir.

Q. Just let us see them.

365      Witness produces two papers and hands them to counsel for libellants.

MR. HAGNER: I offer these in evidence, to be marked "Libellants' Exhibits A and B, Endicott."

Q. These ratings are in what are called the American Lloyd?

A. The American record of American and foreign shipping.

MR. WILSON: I object to this as having no relevancy to the issue here and more pertinent to ancient history.

Q. Mr. Endicott, will you state whether she was rated at the time of her injury at Georgetown?

A. She was not.

Q. Can you tell me why you didn't renew her rating?

A. We don't renew the rating unless we are engaged in what we call foreign business. After our fourteen-year rate runs out we don't often renew it. All the owners in that vessel—nearly all—are their own insurers, and in carrying lumber and in carrying coal and cement and such things as she was engaged in in the coasting trade we have no difficulty in getting insurance on her cargo, and we don't care to go to the expense of having her opened and rerated.

Q. What would it have cost to have her rerated?

MR. WILSON: Objected to as immaterial and incompetent.

### 366      LIBELLANTS' EXHIBIT A, ENDICOTT.

Official number of vessel,  
8994.

International code signal  
letters, J. P. C. N.

Record of American and Foreign Shipping, New York.

*Certificate of Classification.*

The American Shipmasters' Association.

No. 8477.

NEW YORK, September 28th, 1885.

To all to whom these presents may come:

This certifies that the tern Ellen Tobin, of New York, of 413.60 tons register, with two decks built at Kennebunk, Me., in the year 1874, "May" opened, sound Sept., 1885, in general good condition, whereof Captain John Hankins is master, was duly surveyed, at the port of New York, September, 1885, and has been ordered in the

"record" with the class \* A 1 for five (5) years from May, 1885, subject to conditions of rules, and is deemed fit to carry dry and perishable cargo.

[SEAL.]

THOMAS T. HAYDEN,  
*As't Secretary.*

FRANCIS A. MARTIN,  
*Of the Classification Committee.*  
AUSTIN JAYNE, *Surveyor.*

367 LIBELLANTS' EXHIBIT B, ENDICOTT.

Official number of vessel, 8994. International code signal letters, J. P. C. N.

Record of American and Foreign Shipping, New York.

*Certificate of Classification.*

The American Shipmasters' Association.

No. 5625.

WILMINGTON, DEL., July 29, 1881.

To all to whom these presents shall come :

This certifies that the tern Ellen Tobin, of Jersey City, of 435.80 tons register, with two decks & houses, built at Kennebunk, Maine, in the year 1874, May, opened (survey No. 1) half time, 1 rprs. aft, some new beams, calk all 7 | 81, whereof Capt. James M. Rose is master, was duly surveyed at the port of Wilmington while repairing June or July, 1881, and has been entered in the record with the class\* A 1 for eleven years from May, 1874, subject to conditions of rules, and is deemed fit to carry dry and perishable cargo.

[SEAL.]

JAMES PATHER, *Secretary.*

FRANCIS A. MARTIN,  
*Of the Classification Committee.*  
GEO. T. HEWITT, *Surveyors.*

N. B.—Should the vessel suffer damage she must be submitted to a survey, in default of which this certificate may be cancelled. The surveyor must be called whenever the sheathing is stripped or renewed or the vessel is being repaired or caulked, and the same must be endorsed on this certificate.

Attention is called to sections 2, 3, and 6 of rules.

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\* This certificate is granted with the understanding that the vessel be kept in good repair and be subject to the following surveys during the term assigned, failure to comply with which renders her class herein liable to be cancelled :

Iron vessels, first and second class, to be surveyed within five years from launching and each four years thereafter; third class, within four years from launching and each three years thereafter. Wooden vessels subject to examination once in two years, and half-time survey if granted a term over seven years.

The surveyor must be called whenever the sheathing is being stripped or renewed or the vessel is caulked or repaired, to have same endorsed hereon. In case of damage, the vessel must be subject to a new survey.



368 A. That would vary according to how much they made us open her. I suppose anywhere from one hundred and twenty-five to two hundred and fifty dollars.

Q. Have you the record of the Shipmasters' Association for the year 1893? If so, see if the Ellen Tobin is mentioned in there.

(Witness being handed a book entitled Record of American and Foreign Shipping.)

A. Yes, sir; on page 416 you will find all about it.

Mr. WILSON: Objected to as immaterial and incompetent.

The WITNESS, continuing: T. R. N. That shows she was a three-masted schooner, American, 136 feet seven inches length, thirty-two-foot beam, fourteen foot five inches depth, double deck, 414 tons register; built in 5th month, 1874, at Kennebunk, Me., Charles Burnett, managing owner. She was repaired in the 7th month, 1881; decks calked 7th month, 1885; calked again 6th month, 1887, and docked and repaired sixth month, 1891, and her rated expired 5th month, 1890. She was surveyed in Baltimore the 1st of Jan., 1892.

Q. Are those facts stated there true?

A. Yes, sir.

Q. Was the Ellen Tobin insured at the time of her injury at Georgetown?

A. No, sir.

Q. What was the Tobin's complement of crew for outside navigation?

A. Seven men, all told.

Q. How many before the mast?

A. Four before the mast.

369 Q. What was the value of the Tobin immediately prior to her injury at Smith's dock, in Georgetown?

A. I considered her well worth \$10,000.

Q. When did you arrive here after the injury?

A. She sunk on Sunday, the 6th of August, I think, and I arrived here on Tuesday morning; that would be the 8th.

Q. The Tuesday after she was sunk?

A. Yes, sir.

Q. Describe her condition when you saw her first on that day.

A. I found her sunk at Smith's wharf and the deck raised up from three to four feet and the mainmast shoved up. Her main rigging parted, and I considered her a total wreck, in my judgment, after I looked her over; injured beyond repair.

Q. What do you seagoing men call her condition? What was the condition of her keelson?

A. Well, I took it for granted—of course I could not see down there—that her keel and keelson and fore-timbers must be broken. I could see her deck beams were broken.

Q. What do you call the keel and keelson?

A. We call the backbone of the schooner. I considered her backbone was broken. That is the most substantial part of the schooner, where the strength is.

Q. Could you see between-decks?

A. I could see what we call the between-decks, just below the first deck; but the lower hold, it was filled with water and stone, so that I could not see far in her.

Q. Where was the stone that was in her?

370 A. The only thing I could see was in the hatches. I could see where it came up in the hatches.

Q. Was there any stone on the second deck?

A. I think there was a little scattered around the hatchways, fallen there as it went into the vessel.

Q. What was the condition of her centerboard well?

A. Her centerboard well was shoved up through her.

Q. How was she affected by the tide then?

A. The ride rose and fell in the inside of the vessel the same as it did out. I staid there and watched for a while.

Q. Now, what was the condition of her hull then on the outside as compared with her condition at the time of the sale? Were you there at the time of the sale?

A. Yes, sir. I don't think there was any material difference in the condition of her hull.

Q. What was the condition of her deck on that Tuesday, the first Tuesday you saw her?

A. The decks were shoved up.

Q. What was the condition of her deck timbers?

A. Some of the deck timbers were broken—that is, the upper deck timbers; the lower ones I could not see.

Q. Could you see whether the decks were shoved up by the crushed stone in her?

A. No; because the crushed stone did not touch the decks.

Q. What were the decks shoved up by?

A. It must have been by some obstruction under her bottom; that was my idea; I could not see.

371 Q. What did the obstruction on the bottom do—shove up what?

A. Shoved up the bottom and the bottom shoved the deck up with it. There must have been something to force up the bottom and force the deck up.

Q. After the stone had been taken out could you see down into the hold through the water?

A. Well, a short distance; not very far.

Q. If the Ellen Tobin had received no injury prior to her injury at Smith's dock, what was her value just prior to that injury at the berth of Smith's?

A. Well, as I told you before, I considered her worth \$10,000.

Q. Upon what do you base that value?

A. I base that upon my knowledge of the condition of the hull of the vessel and the condition of her outfitings and upon her earning capacity.

Q. Have you made any list or papers showing her earning capacity for the last five years?

A. Yes, sir.

Q. Let us see it. Did you prepare it?

(Witness handing counsel for libellants a paper-writing.)

A. It was prepared by my book-keeper from the book I have with me.

Mr. WILSON: I note an objection to that as incompetent and immaterial.

Q. You have been over it, have you, Mr. Endicott?

A. Yes, sir.

Q. And you found it correct?

A. Yes, sir.

372 Mr. HAGNER: I offer this paper in evidence, to be marked "Libellants' Exhibit C, Endicott."

LIBELLANTS' EXHIBIT C, ENDICOTT.

Bills.	Dividends.
438 55	317 44
496 17	397 44
53 49	722 23
32 32	461 87
75 19	440 96
842 85	519 80
144 02	432 64
289 02	672 96
171 38	392 64
68 07	506 88
56 85	479 82
259 86	269 77
63 73	458 37
116 63	396 57
166 29	327 04
327 70	279 37
437 91	349 85
2,191 59	387 20
22 71	318 86
187 86	420 48
90 54	415 36
80 19	301 12
18 73	297 29
553 94	224 96
90 21	255 64
730 68	464 78
32 77	
<hr/> 8,039 25	<hr/> 10,511 34

373 Q. That shows her earnings for how long?

A. Five years. It shows the returns, the money expended on her, and the earnings over and above all that it cost to the owners.

Q. Now, her bills were how much during that time?

A. Eight thousand and thirty-nine dollars and thirty-five cents.

Q. And her profits?

A. Ten thousand five hundred and eleven dollars and thirty-five cents.

Q. That would leave how much percentage, on an average, of her value?

A. That would leave over twenty per cent. a year.

Q. On the sum of what?

A. On the sum of ten thousand dollars.

Mr. WILSON: All these questions and answers are objected to as inadmissible and incompetent.

Q. Did you get your share of the profits?

A. Yes, sir; all except —; there was an undivided balance in my hands at the time the schooner was sunk; I think about four hundred dollars. I had my share of all the rest.

Q. It is in evidence that Capt. John Hankins was in possession of the schooner Ellen Tobin. I want to ask you whose possession Capt. Hankins' possession was.

Mr. WILSON: The question is objected to as leading, incompetent, and immaterial.

A. He was in possession as agent of the other owners and myself.

Q. Who were those owners, Mr. Endicott, immediately prior to the Tobin's being sunk in front of Smith's dock? And state if they are given properly, with their residences, in the libel.

374 Mr. WILSON: Objected to as incompetent and not a proper way of proving this.

The witness, being handed the libel, read the names of the parties libellant and answered:

A. Yes, sir.

Q. Give the distinct interest of each owner and the proportion of which each of them owned in the schooner.

Mr. WILSON: That is objected to as incompetent, immaterial, irrelevant, and inadmissible.

A. Charles Burnett,  $\frac{1}{4}$ ths; estate of Christian D. Empson,  $\frac{9}{64}$ ths; Michael Tobin and Peter Connolly—I have their interests together here—I haven't them separate,  $\frac{8}{64}$ ths; Charles G. Endicott,  $\frac{7}{64}$ ths; estate of Michael S. Allison and Mrs. Samuel C. Allison,  $\frac{4}{64}$ ths; William B. Lloyd,  $\frac{4}{64}$ ths; William Booth,  $\frac{4}{64}$ ths; John Van Buskirk,  $\frac{4}{64}$ ths; Drucilla S. Cox,  $\frac{4}{64}$ ths; estate of Thomas D. Endicott,  $\frac{2}{64}$ ths; Richard C. Washburn,  $\frac{2}{64}$ ths; Charlotte A. Rogers,  $\frac{2}{64}$ ths; Michael De Mott Vreeland,  $\frac{2}{64}$ ths. That should make  $\frac{64}{64}$ ths.

Q. Was that possession you have described held as notorious possession under claim of ownership?

A. Yes, sir.

Mr. WILSON: Objected to as leading and incompetent.

Q. It is usual or unusual for vessels to be owned in that way in different shares?

Mr. WILSON: Objected to.

375 A. That is the usual custom of vessels I am interested in.

Q. Of what country are the libellants citizens?

A. I think they are all citizens of the United States.

Q. What did you do first after you came here the Tuesday after the vessel was injured?

A. I went aboard of the vessel and looked her over and formed my judgment about her and then telegraphed to Charles Burnett at Saratoga, N. Y., to meet me in my store on Thursday, in Jersey City, N. J., and then I went back to Jersey City.

Q. What did you do then?

A. He met me at my store at Jersey City and we talked over the matter and we arrived here on Friday morning after the vessel sunk.

Q. Did you communicate with the owners then?

A. No; only with him.

Q. Where were the owners?

A. They were scattered at different points.

Q. What were your powers as managing owner?

A. As managing owner I am supposed to look out for the interests of the vessel, settle the freights for the captain, make the dividend, and I have supervision of her repairs, but I never feel like assuming responsibility in a case of this kind myself. I wanted the consultation with the owners, and that is the reason I brought Captain Burnett here to look the situation over. I had my opinion of what the situation was, but I wanted his opinion, too. We went aboard the vessel Friday morning. He went down aboard the vessel Friday morning and took in the situation, and he concluded that she was a total loss also.

376 Mr. WILSON: Objected to as stating a conclusion.

Q. Was there any meeting of the owners called?

A. Yes, sir; after we returned to Jersey City there was a meeting called Aug. 14th for the 16th of August at my store.

Q. Well, what was the result of that?

A. The result was there was a majority of the owners present; some were away.

Mr. WILSON: Objected to as immaterial.

The WITNESS, continuing: And I was appointed to see whether the owners were liable or could be compelled to remove the vessel—to get the cargo out and remove the vessel and what the probable cost would be and report back them, and I asked for some one to consult with in the matter to come with me, and Captain Frederick Davey was appointed. This was on the 16th, and on the 17th, on Thursday morning, Captain Davey and I took the train and came to Baltimore to get legal advice in the matter. We went to some five or six lawyers, at their offices, and found they were all

away from home. We then came to Washington, Thursday morning, and I took Captain Davey on board the vessel Friday morning and had him form his judgment of her.

Q. What happened then, on August 22nd ?

A. On August 22nd there was a meeting of the owners called, and I reported to them that the probability was—we had employed you here (indicating Mr. Hagner)—and you were to send us a written report. I had not received that from you that morning, and I told them the probability was we would have to remove  
377 the vessel, and then I was instructed to go ahead and do the best I could.

Q. Did you see the Messrs. Smith or either of them when you came on here ?

A. I saw Mr. Smith when I was here on Tuesday after the schooner sunk, and I saw him again on Friday in company with Captain Burnett in Joseph H. Lee's store.

Q. Counsel for respondents in this case has asked Capt. Burnett for his account of what occurred—the conversation that occurred between him and Mr. Smith as to an offer of compromise. I want you now, as that has been brought out, to state exactly what occurred at that conversation. I think it was in Mr. Lee's store.

A. Yes ; in his office. I talked with Mr. Smith and finally told him we should hold him responsible for the wreck of the vessel, and after a while he asked me what we thought the vessel was worth and I told him \$10,000 and I asked him if he had any proposition to make me. He said no. He said the proposition should come from me, and he intimated that he might help towards getting the stone out. He said he had a derrick and an engine on the dock and he had scows and such things, and about the only thing he needed was a steam-pump, and I asked him if he would take the stone out then. I asked him if he would do that. He said he was not willing to attempt that, but he said that he would be willing to do something, and then I think he asked me for a proposition, and while I was considering the matter what I would say to him with Capt. Burnett Capt. Burnett said, We will discount the offer of ten  
378 thousand dollars fifty per cent. and you to take the vessel as she is, and after some further conversation he asked for time to consider the matter and I was to call at his office a little after four o'clock that day—that afternoon. At about half past four I called at his office. He was not in, but came in shortly afterwards and said to me he had no offer to make, no proposition to make, and instructed me to remove the vessel, as she was an obstruction.

Q. Was there anything there said by Capt. Burnett, as reported by the questions of counsel for the respondents, to the effect that he had an idea that both sides were at fault ?

A. No ; not in my presence ; no, sir.

Q. Were you there present ?

A. I think I was present all the time and heard nothing of the kind.

Q. Did you come away with Captain Burnett ?

A. Yes, sir ; from his office.

Q. Did you communicate with any wreckers to try to raise the vessel at any time?

A. Yes, sir. When I came on with Capt. Burnett the Friday after she was sunk—on Saturday I instructed Capt. Hankins to go to Norfolk some time Sunday or Sunday night, so as to be there Monday morning and see the wrecking companies there and see what could be done towards raising her.

Q. Have you any letters in reply?

A. I also wrote the Merritt organization. I think I have a letter here from them (witness handing letter to counsel for libellants).

MR. HAGNER: I offer this letter in evidence, to be marked "Libellants' Exhibit D, Endicott."

379 LIBELLANTS' EXHIBIT D, ENDICOTT.

Merritt Wrecking Organization, &c.

NORFOLK, VA., August 15th, 1893.

Mr. Charles G. Endicott.

DEAR SIR: Yours of the 14th at hand and noted; will not go to Washington until I hear from you what you decide on at your meeting. If you conclude to have the vessel & cargo raised, when you get in position to talk business you can let me know, and I would be pleased to render you all assistance you require. Many thanks for past favors.

Yours most respectfully,

H. SEYMOUR.

380 MR. WILSON: I object to the offering of this paper in evidence as immaterial and as of no account.

Q. Well, what was the result of that?

A. The purport of that letter?

Q. The result of that letter was what? Was anybody sent on here?

A. He sent a man after that.

Q. Who was he?

A. A gentleman who was examined here just previous to me, Capt. Coley.

Q. Have you any other letters that you received from wreckers about that time?

A. I have later on; two from French and Cole and one from the Baxter Wrecking Company (witness handing counsel for libellants three paper-writings).

MR. HAGNER: I offer these three letters—two from French and Cole and one from the Baxter Wrecking Co.—in evidence, to be marked "Libellants' Exhibits E, F, and G" respectively.

MR. WILSON: Objected to as immaterial and incompetent.



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## LIBELLANTS' EXHIBIT E, ENDICOTT.

French &amp; Cole, wreckers.

NORFOLK, VA., *Sep. 6, 1893.*

Capt. Endicott.

DEAR SIR: Have you made any arrangements or do you expect to soon about raising your schooner, laying sunk now at Georgetown, D. C., with stone in it, so we would like to have chance to bid on her for raising her; and if so wanted I would go to Georgetown and see her condition and let you know.

Respectfully,

FRENCH &amp; COLE.

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## LIBELLANTS' EXHIBIT F, ENDICOTT.

French &amp; Cole, wreckers.

NORFOLK, VA., *Sep. 10, 1893.*

Mr. Endicott.

SIR: Your letter received, and you stated you have made no arrangements about raising your schooner. I am going away for a day or so. As soon as I return I will go up and look at her and let you hear from me.

Respectfully,

FRENCH &amp; COLE.

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## LIBELLANTS' EXHIBIT G, ENDICOTT.

Office of John F. Baxter, ship-chandler, 308 West St.

NEW YORK, *Sep. 9th, 1893.*

Mr. Chas. G. Endicott, Jersey City, N. J.

SIR: In reply to yours of 8th inst., relating to case of schr. Ellen Tobin, I have to say that we are just now entirely too busy with home work to be able to look after this job. I am obliged to you for writing.

Very respectfully y'r's,

J. F. BAXTER.

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Q. Did you get bids?

A. Only from French and Cole.

Q. One of how much?

A. One of \$8,000; they afterwards modified it to \$7,000.

Q. Was there any particular reason for the wreckers not making bids, if you know?

A. Well, they expressed to me in their letters, and also——

Mr. WILSON: Objected to as immaterial.

The WITNESS, continuing: And also they were busy at work enough at home without coming here.

Q. Why was that?

A. The wreckers around New York, the Baxter Wrecking Co., and the Chapman Wrecking Co., and the Scott Wrecking Co.; I think you have those letters there.

Q. Why was it? Why were they busy?

A. We had had severe storms and there was a great deal of wrecking work for them to do.

Q. What efforts did you make to get bids—from what points?

A. Anywhere from New London, which is the headquarters of Scott, all the way down to Norfolk, New York, and Philadelphia.

Q. What was the trouble there?

A. One objection was to the stone. They thought it was very difficult to get the stone out and they didn't want to bid on it, and another objection was, it was so far from home, such a long distance to move their plant to go to work.

385 Q. Then was there anything said about getting the stone out with pumps? Was there any question as to whether the stone would feed to pumps?

A. Some of them thought it would not—that the fine stone mixed in with it would cement it.

Q. Do you know whether there was any question about getting the vessel with pontoons alongside through the Long bridge?

A. Only as I had it from the captain. I know nothing of my own knowledge.

Q. Who bought the vessel at the sale?

A. I bought her in for the owners.

Q. For how much?

A. \$25.

Q. Before the sale did you cause any hand-bills to be put up?

A. We caused hand-bills to be put up, announcing the sale, all the way from Bath, Me., to Richmond, Va. There was a correction in the hand-bills which appeared in those put up. The majority of those had this correction on. I mailed a few before I received this notice.

(Witness handing counsel for libellants printed paper.)

Mr. HAGNER: I offer this hand-bill in evidence with the correction, to be marked "Libellants' Exhibit H, Endicott."

Q. Do you remember whether Mr. Smith, Jr., was present at the sale?

A. I saw him on the dock at the sale.

Q. After the crushed stone was taken out of her did you try to get bids for raising her?

386 A. Yes, sir.

Q. Well, what was the result?

A. I didn't get any. I wrote for bids to the Merritt Wrecking Organization, French and Cole, the Baxter Wrecking Co., and Chapman.

Q. From the Philadelphia man did you—

A. I did. A man by the name of Wolters came on here and met me aboard of the vessel.

Q. What did he say about it?

A. I asked him to make me a bid for raising her, and after looking her over he thought it was a difficult piece of business to do and he was not willing to make a bid. He said he would do it by days' work but he would not make a bid on it.

Q. Did you pay his expenses here?

A. Yes, sir.

Q. Have you his bill there?

A. Yes, sir.

Q. Produce it.

Witness hands counsel a bill.

Mr. HAGNER: I offer this bill in evidence, to be marked "Libellants' Exhibit I, Endicott."

387 LIBELLANTS' EXHIBIT I, ENDICOTT.

PHILADELPHIA, Nov. 2nd, 1893.

Mr. Endicott & Co., schr. Ellen Tobin, to Herman Wolter, submarine diver and contractor, Dr.

For travelling expenses to Washington and hotel bill. . . . . \$7 50

Received payment,

H. WOLTER.

388 Q. Did you try any one else?

A. No.

Q. Only the ones you have mentioned above?

A. Yes, sir.

Q. Take Exhibit D to the libel and state what it is (witness being handed Exhibit D to the libel).

A. It is an agreement which I signed for a conditional sale of the vessel to Mr. Lord.

Q. Where are the bills of sale you have made out to Mr. Lord?

A. I forwarded those to you.

(The bills of sale are herewith submitted, together with the original registration of the Ellen Tobin, and, by stipulation of counsel are to be withdrawn and copies of the registration to be used instead of the original, by consent of counsel and consent order of court.)

Q. What was the state of the money market from August 1st on to January 1st?

A. A tight money market.

Q. What was the state of the money market from August 1st, 1893, to January 1st, 1894? It was very tight, wasn't it?

Mr. WILSON: Objected to as immaterial.

A. It was very tight. Hard money market.

Q. Was it on that account or otherwise that you were prevented from accepting the bid of \$8,000 from French and Cole?

A. No; we thought it was a large amount to pay for getting the vessel up, and that we would have to pay for it and charge Mr.

389 Smith for it, and we wanted to send to him to see whether he thought that we had better accept the bid or not. The

letter was written under Captain Charles Burnett's instructions, through Mr. Hagner, to see Smith & Son or their attorneys in regard to it, to see if we had better accept it or to wait awhile and take a longer time to get a lower bid.

Q. Were the holes made in her deck before or after you became satisfied that she was a total loss?

A. Afterwards.

Q. Were they of a serious nature or could they be readily repaired?

A. They could be readily repaired, with little cost.

Q. From your knowledge of vessels, as a vessel-owner and manager, will you state, Mr. Endicott, what was the most economical mode of getting the crushed stone out of the Ellen Tobin?

Mr. WILSON: Objected to as immaterial and incompetent and on the ground that the witness has not been shown to be an expert wrecker.

A. In my judgment, the most economical way was to pump out the stone with force pumps.

Q. Were you present at her survey and condemnation on November first?

A. Yes, sir.

Q. What was the character of the men present who acted as surveyors on that survey?

Mr. WILSON: Objected to as wholly incompetent.

A. Mr. Park Agnew you gentlemen know better than I do. In regard to Mr. Gokey and Mr. Wm. H. Kenzel, they are men of character and high standing in their business.

Q. Do you know if they had been called on to make surveys and make views of vessels?

390 A. They are called upon to make surveys very frequently.

Q. By the insurance companies?

A. Yes, and by the owners.

Q. They are skilled in the vessel business?

A. Yes, sir.

Q. Who composed the firm of Charles G. Smith & Son?

Mr. WILSON: Objected to as immaterial.

A. I understand from the sign and Mr. Lee, in conversation with him, that it was Mr. Smith, Sr., Charles G. Smith, and Charles G. Smith, Jr., and in my conversation with Mr. Smith he only mentioned his father in connection with himself.

Q. The sign you speak of, where is that?

A. Along by the office building.

Q. How long has Michael S. Allison been dead?

A. I don't know. You have the will in evidence here; that will tell. I should say eight or nine years to the best of my judgment.

Q. What is the name of the man who died in December?

A. Peter J. Connolly. He died in October 1893, or about that time—September or October.

Q. One of the wills given here in evidence made three persons the executors. One of those persons was named as a witness. Who qualified?

A. Charles Burnett and myself.

Q. And you and he alone qualified as executors?

A. Yes, sir.

391 Q. And why was the other rejected by the court?

A. The surrogate court objected to a witness being an executor of a will.

Q. Has the Tobin met with any accidents since you have been managing her prior to the injury at Smith's dock, in Georgetown?

A. Nothing serious.

Q. Has the hull of the Tobin met with any accident?

A. No, sir.

Q. What are the accidents you speak of?

A. I speak of an accident she had in March during a blow—in March, 1893—and she lost her anchor and chain.

Q. Was there any accident to her hull?

A. No.

Q. Since you have been managing her?

A. No, sir.

Q. Have the insurance companies insured the goods in her during the last two years?

A. Yes, sir.

Q. Have they had to pay any losses on goods or cargo in her insured in her by reason of dampness or otherwise?

A. No, sir.

Q. In loading and unloading is it not usual to have her tipped down at the stern or head at various times?

A. Yes, sir; just as you load in the forward or aft hatch.

Q. When was the Tobin last in the dry dock?

A. She was on the dry dock in July or August, 1892.

392 Q. How far does the bottom of the pump come from the bottom of the vessel?

A. The pump extends down to about three or four inches of the bottom.

Q. What is the object of that?

A. If you put it down on the plank you could not get any water to suck out.

Q. What is the result of having the pump three or four inches from the bottom?

A. We can pump out the water to within that much.

Q. There is always water in every vessel?

A. Yes, sir; some little water.

Q. What is the object of having water in the vessel?

A. There is no particular object. It does not damage the vessel and we cannot suck it all out, because if you get it down too close the water would not suck out.

Q. When did you see the Tobin last?

A. I saw her on the railways at Alexandria.

Q. When was that?

A. It was along in the fore part of January, somewhere between the 8th and 10th.

Q. What was her condition then?

A. She was there with a broken back, you call it. Her keel was

broken, her keelson broken, her well shoved up, and floor timbers and some of her deck beams broken.

393 Q. Did you go down to examine the keel and keelson?

A. I did.

Q. How much of her bottom was then not touching on the railway?

A. About fifty feet.

Q. She was raised for fifty feet off the railway?

A. Fifty feet not touching; fifty feet in the middle not touching.

Q. Could you see the prints of the rock on her?

A. Yes, sir.

Q. How long did it extend?

A. It extended for about seventeen or eighteen feet across her.

Q. Across the vessel?

A. Yes, sir.

Q. What is the bitt on a vessel?

A. That is a piece of timber put down in the vessel. We sometimes put them there to make lines fast to, and sometimes put winches there, and sometimes we put them there where the windlass lies.

Q. It is like a Greek cross?

A. It is something in that shape.

Q. Its object is to fasten lines to?

A. Yes, sir; to fasten lines to.

Q. What is a chock-hole?

A. It is a hole in the side of a vessel to run lines through to make fast to the bitt.

Q. To make fast to what?

A. To make fast to the bitts.

394 Q. What are the hanging-knees of a vessel?

A. They are like brackets. These are upright knees erected to hold up the beams—the deck beams—to hold them firmly.

Q. Will you take this record and look on the first page of it and read, say, the first five schooners mentioned there on the first page of the record and see how old are they?

(The witness being handed record.)

A. Schooner A. B. Crabtree, built in 1867; A. B. Crosby, built in 1884; A. B. Fields, built in 1853; A. B. Higgins, built in 1867.

Q. The next one?

A. A. B. Perry, built in 1873.

Q. Now go on ten pages further. Take every ten pages and look at that. What is the number of that first page where the record begins?

A. Page 201.

Q. Now look at page 211.

A. There is Adele Ball, built in 1890; Adele Steffens, built in 1882; Adele Thackara, built in 1881; Adeline, built in 1885; Adelia Chase, built in 1875.

Q. Turn to the next ten pages, 221.

A. The Albert Pharo, built in 1853; the Albert Rene, built in

1883; the Albert W. Smith, built in 1873; the Alberta, built in 1888; the Albertina, built in 1890.

Q. Turn ten pages more, and then I reckon I will rest.

A. The Allie B. Cathrall, built in 1885; the Allie B. Dyer, built in 1865; the Alligator, built in 1864; the Allston, built in 1846.

Q. What is that list, Captain?

A. That is the list of vessels, twenty years old and older, I own.

395 Mr. WILSON: I note an objection to all that.

Mr. HAGNER: I file that list in evidence, to be marked "Libellants' Exhibit J, Endicott."

Mr. WILSON: I object to that as immaterial.

#### LIBELLANTS' EXHIBIT J, ENDICOTT.

Schr. Moonlight,	Aug't, 1855.
" W. R. Beebe,	Oct., 1860.
" S. J. Vaughn,	Dec., 1861.
" E. R. Kirk,	Oct., 1864.
" H. J. Raymond,	Dec., 1864.
" James Ponder,	1865.
" Stephen Morris,	July, 1866.
" Harry Landell,	Oct., 1866.
" L. Q. C. Wishart,	1867.
" Henry Parker,	Nov., 1867.
" Florence Shay,	Dec., 1867.
" Z. Steelman,	Nov., 1868.
" S. S. Hudson,	Oct., 1869.
" Harry C. Shepherd,	Sep., 1870.
" L. C. Somers,	June, 1871.
" W. D. Hilton,	Dec., 1871.
" Francis Shubert,	Aug., 1872.
" C. W. Alcott,	Jan., 1873.
" John D. Williams,	June, 1873.
" Geo. R. Vreeland,	July, 1873.
" Sunlight,	Sep., 1873.
" N. H. Burrow,	June, 1874.
" Thressa Woolfe,	do. 1874.
" James Slater,	July, 1874.
" J. B. Carrington,	Sep., 1874.
" Jessie W. Starr,	Oct., 1874.
" Kate E. Gilford,	Nov., 1874.
" Susan B. Ray,	Nov., 1874.
" Geo. Churchman,	Aug., 1874.

396 Q. Mr. Endicott, do you remember the names of the two sailors on the Ellen Tobin at the time she was sunk at the dock in Georgetown?

A. Andrew Stevens and Martin Thomson.

Q. What are these (witness being handed papers)?

A. Those are affidavits I drew the 8th of August, 1893.

Q. You had them sign them?



A. Yes, sir.

Q. I want to ask you, Mr. Endicott, if you ever tried to get these sailors.

A. Yes, sir; I tried and am still trying.

Q. You had them, you say, make these affidavits?

A. Yes, sir.

Q. Did they give you these numbers, 202 Hamilton St., given in these affidavits? Who were they given by?

A. By these two sailors.

Q. What kind of a place is it?

A. Tenement-house.

Q. Sailors' boarding-house?

A. No, sir.

Q. Tenement-house?

A. Yes, sir.

Q. Did you ever try to get these men?

A. I did.

Q. And so far have you had any success?

A. No, sir.

Mr. HAGNER: I want to offer these affidavits in evidence. I don't pretend they are worth anything, but I want to show what they would testify to if we could catch them.

Two papers filed and marked Exhibits "K & L," Endicott.

"LIBELLANTS' EXHIBIT K, ENDICOTT."

GEORGETOWN, D. C., Aug. 8, 1893.

Andrew Stevens, of 202 Hamilton avenue, Brooklyn, N. Y., being duly sworn by me, on his oath saith—

That he shipped on board the schr. Ellen Tobin, of New York, in the port of New York, on the 21st day of July, 1893, and made the voyage from said port to Fort Washington, Md., loaded with cement; that said schooner was staunch and strong and in a perfectly seaworthy condition during said voyage. After she was discharged at Fort Washington we proceeded to Georgetown, D. C., and commenced to load crushed stone for the Potomac Stone Co. We remained on board and tried the pumps night and morning and did not get more than fifty strokes of the pump each time. On Sunday morning, Aug. 6, 1893, tried pumps 7.30 and found schooner leaking very badly, and also discovered she was aground on the stone or rock in the river alongside the Potomac Stone Co. dock; that she filled with water and broke in two about five o'clock Sunday afternoon.

ANDREW STEVENS.

DISTRICT OF COLUMBIA, }  
County of Washington. }

Sworn to before me this 8th day of August, 1893.

LOUIS P. SEIBOLD, [SEAL.]  
Notary Public.

Witnesses:

JOHN D. C. KOOGLE.  
L. P. SEIBOLD.

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## LIBELLANTS' EXHIBIT L, ENDICOTT.

GEORGETOWN, D. C., Aug't 8, 1893.

Martin Thomson, of 202 Hamilton Ave., Brooklyn, N. York, being duly sworn by me, on his oath saith—

That he shipped on board the schr. Ellen Tobin, of New York, in the port of New York, on the 21st day of July, 1893, and made the voyage from said port to Fort Washington, Md., loaded with cement; that said schooner was staunch and strong and in a perfectly seaworthy condition during said voyage. After she was discharged at Fort Washington we proceeded to Georgetown, D. C., and commenced to load crushed stone for the Potomac Stone Co. We remained on board and tried the pumps night and morning and did not get more than fifty strokes of the pump each time. On Saturday evening, Aug't 5, '93, about six o'clock, tried pump and got same result. On Sunday morning, Aug't 6, '93, tried pumps about 7.30 and found schooner leaking very badly, and also discovered she was aground on the stones or rock in the river alongside the Potomac Stone Co.'s dock; that she filled with water and broke in two about five o'clock Sunday afternoon.

MARTIN THOMSON.

Witnesses:

L. P. SEIBOLD.

JOHN D. C. KOOGLE.

DISTRICT OF COLUMBIA, }  
County of Washington. }

Sworn to before me this 8th day of August, 1893.

[SEAL.]

LOUIS P. SEIBOLD,

Notary Public.

Mr. WILSON: I desire to note an objection to them.

Q. You have made every effort you could to find these men?

A. Yes, sir.

Q. How have you tried?

A. I have sent to their residences for them, which were given me, and I have the shipping masters who ship them watch for them and as soon as they come into port to notify me.

399 Q. I want to ask you when you saw the Ellen Tobin at the railway at Alexandria what was the condition of her timbers above the bilge—above the curved line of her bottom.

A. On the sides?

Q. Yes, sir.

A. Her sides were in fairly good condition, strained a little, but in pretty good shape.

Q. Other than where you could see she was strained, what was the condition of her seams?

A. Good.

Q. The question was asked here of Captain Burnett, I think, by the counsel on the other side, what the earnings of the Tobin were

for the last five months prior to her injury, and I will ask you again to tell what they were.

A. She earned about fifteen hundred dollars; about \$780 of that was expended on her and \$720 cleared.

Q. What was that expenditure for?

A. That was for the anchors and chain lost in March and for other repairs and expenses of the vessel.

400 Cross-examination.

By Mr. WILSON:

Q. It appears from the book you read out of under the head of the Ellen Tobin that she was surveyed in Baltimore in 1892. What occasioned that survey?

A. That was made by the insurance agents on their own account; they made these surveys when we get to a railway for their own benefit.

Q. Was she on a railway in Baltimore?

A. She was there doing some work at the railway, not on the railway.

Mr. HAGNER:

Q. Having some work done on her?

A. Yes, sir.

Mr. WILSON:

Q. In 1893, I understand, she was not out of the water?

A. No, sir.

Q. And not repaired?

A. No, sir; we generally haul out in July or August, and we would have hauled her out if she had come back to New York all right. We haul it once a year, endeavor to do that, to put on copper paint. We generally overhaul and put on copper paint against worms.

Mr. HAGNER:

Q. Which begin to eat when?

A. Along about August and September.

Q. Is that the first voyage she made to Washington, the season of '93?

A. Yes, sir.

Q. How long did she lay up before that time?

A. She lay up from the last of December or fore part of January; I don't recollect the date.

401 Q. Where did she lay up?

A. At the Lehigh Valley coal docks, at the foot of Hudson St., Jersey City.

Q. Where did she make her first voyage that year?

A. I think she went to Baltimore for coal.

Q. Anything happen to her there by way of an accident?

A. No, sir; in March, in her passage, she anchored under the beach and lost her anchor and a chain in a gale of wind.

Q. Nothing happened to her in the port at Baltimore?

A. No, sir; not that I am aware of; not to my knowledge.

Q. What was her second voyage?

A. She went for coal. I am not sure whether to Baltimore or Norfolk.

Q. When was the next voyage and where?

A. She made one in March, she made one in April, one in May, and one in June, and one in July.

Q. All to the same place?

A. No; she would sometimes go in the sound ports; such places as New London and New York?

Q. And carried coal all the time?

A. Yes, sir.

Q. From what points?

A. From Norfolk or Baltimore or Philadelphia.

Q. Can you state, in respect to each voyage, where she sailed from?

A. No, sir; I cannot do that.

Q. You cannot do that?

A. No, sir; I have too many vessels to keep track of every trip they make.

402 Q. Do you keep a record of them?

A. I keep a record of the freights, but not of the ports between which they go.

Q. Had she the same captain all the time?

A. Yes, sir.

Q. And the same mate?

A. That I don't know.

Q. The same crew?

A. No; I think not. It is usual to change crews every trip. When we go into port the crews generally leave at the end of the voyage.

Q. Do you know of any accident happening to her after she started out in February, 1893?

A. No; not outside of that loss of the anchor and chain.

Q. How much water did the Tobin draw?

A. Somewheres about 14 or 14½ feet. I am not sure; about 14, I think.

Q. And her record expired in 1880?

A. 1890.

Q. 1890?

A. Yes, sir.

Q. And she was not rated again after that?

A. No, sir.

Q. You put in evidence here a paper?

A. Yes, sir.

Q. Which shows the bills and dividends?

A. Yes, sir.

Q. What time does it extend over?

403 A. That covers, I think, from the last of July or the first of August, 1888, till the schooner was sunk.

Q. By years, or by trips, or how is it made?

A. By trips; sometimes we settle ordinarily every two trips. Sometimes when we are putting repairs on the vessel and we have nothing to divide it goes longer.

Q. As I understand, \$8,039.35 is the total amount of the bills?

A. Yes, sir; the expenditures of the vessel in five years.

Q. And I understand \$10,513 is the total amount of the dividends?

A. Yes, sir; that was all divided except a little over \$400.

Mr. HAGNER: Is that the gross amount.

A. The net amount divided among the owners.

Mr. HAGNER: I mean the money divided after the bills and expenses were paid.

A. It is the gross amount of the dividends paid.

Mr. HAGNER: How much?

Mr. WILSON: \$10,513.

The WITNESS: Yes, sir; with the exception of about \$400 in my hands.

Q. And that was the total of all the dividends from 1888 until the vessel sank?

A. Yes, sir.

Q. That is five years?

A. Five years; yes, sir.

404 Q. Does it include 1888?

A. A part of 1888.

Q. State exactly the time it covers, please.

A. It covers from July 24th, 1888, up to the time the vessel sank; it sank the 6th of August. That would be five years and a few days over.

Q. The bills that were paid were paid out of the earnings?

A. Yes, sir.

Q. And are not included in the dividends?

A. And are not included in the dividends; no, sir.

Q. I see one bill paid of \$2,191. What was that for?

A. That was in 1891.

Q. What was that for?

A. That was a railway bill in Brooklyn for \$1,200 or \$1,300, and the balance was for what we call outfittings of the vessel, such as rigging, sails, &c.

Q. When did you arrive in Washington after the vessel sank?

A. The Tuesday morning after she sunk. She sunk Sunday, the 6th, and I arrived on Tuesday morning, the 8th.

Q. When did you first see the vessel?

A. I think about ten o'clock Tuesday morning.

Q. How and where did she lay?

A. She lay sunk at Mr. Smith's stone dock.

Q. Was the deck above water?

A. Yes, sir; the upper deck.

405 Q. Did you cause any examination to be made as to her position there at the dock?

A. No; only my own examination.

Q. Or any measurements to be made?

A. No, sir.

Q. When was the conversation that occurred between the owner, Mr. Burnett, and Mr. Smith?

A. It was on Friday morning after the vessel sunk—Friday forenoon.

Q. What did you do after you got here?

A. Well, we arrived here Thursday night.

Q. And I understood you to say that in that conversation 50 per cent. was taken off the price?

A. Captain Burnett said he would discount it 50 per cent.

Q. What did that mean?

A. That is, he would take \$5,000 and Mr. Smith take the vessel as she lay.

Q. And Mr. Smith to take the vessel as she lay?

A. Yes, sir.

Q. And Mr. Smith responded to that what?

A. He didn't appear to be willing to do that. I don't recollect the exact words about that. He didn't accept the offer.

Q. Did you hesitate for some time as to what you would do with the vessel, whether to abandon her or attempt to raise her?

A. Yes, sir.

Q. When did you decide what you would do?

A. I decided that, I think, about the 18th or 19th of August.

Q. About the 18th or 19th of August?

A. Yes, sir.

406 Q. What did you decide?

A. That we would have to raise her. I came to the conclusion we would have to remove her.

Q. And you decided then not to abandon her?

A. No; I did not decide that. What I hesitated about was whether we would have to remove the vessel or not, and I think it was about the 18th or 19th that I made up my mind that we would be compelled to remove her. I thought we could probably leave the vessel where she was.

Q. You were notified by Mr. Smith to remove the vessel?

A. Yes, sir.

Q. When was that?

A. Friday afternoon, in his office.

Q. What date of the month?

A. I think that would be the 11th.

Q. Of August?

A. Yes, sir.

Q. When was she actually removed?

A. She was removed, I think, somewhere about Thanksgiving.

Q. In November?

A. In November; yes, sir.

Q. And she was lying there from August to November, after you received notice from Mr. Smith to remove her?

A. Yes, sir.

Q. What was the object of the survey you had made?

A. To determine whether the vessel would be condemned or not.

407 Q. And the date of that was?

A. I think that was about the 1st of November.

Q. Why did you postpone the examination so long?

A. I will let Mr. Hagner answer that. I was waiting for his advice on the matter.

Q. Did you receive any notice from any of the authorities of the port or Government for the removal of the vessel?

A. No, sir; I did not.

Q. Do you know of any *been* given?

A. No, sir; I know that the captain went to see some of the officials of the War Department.

Q. What did you understand to be your rights and duties in relation to that vessel from the 11th of August till the time she was removed?

A. From the 18th or 19th of August, somewhere along there, I understood we would have to get her out of the way.

Q. Do you wish it understood that you did all that was possible for you to do to get her out of the way?

A. I did up to the 23rd day of August; I was taken sick then.

Q. After that you had nothing more to do with it?

A. No, sir; not till the last of October.

Q. Then you had no actual management of the vessel after that time, or between the dates you name?

A. No, sir.

Q. When you got well, what did you do?

A. When I got well, we had made a contract to get the stone out, and as soon as the stone was out I came here and held a survey of the vessel.

Q. The contract was that a man who was here in the District should get the stone out?

408 A. Yes, sir.

Q. Do you know personally when the stone was gotten out?

A. No, sir; only I know it was somewhere in the latter part of October.

Q. When you were here did you make any inquiry, or did you make any effort relative to the removal of the stone?

A. I instructed the captain to see if there was anybody around Washington that would remove it.

Q. How long were you here?

A. The first time when I came on Tuesday, I was here Tuesday till Wednesday morning, and the next time I came on Thursday after that.

Q. What was the month?

A. That was the night of the 10th, and remained till the forenoon of the 12th.



By Me. HAGNER: That was the second time?

A. Yes, sir.

Q. The first time you got here the 8th?

A. The 7th; the morning of the 8th. I left overnight in the 7th, and I got here the morning of the 8th.

Q. Of August?

A. Of August. At that time I was undecided. I did not think we would be compelled to remove the vessel. I sought advice in Baltimore and New York whether I would be compelled to remove it or not.

By Mr. WILSON: Did you inform the Mess. Smith you would not remove the vessel?

A. No, sir; I did not.

409 Q. Did you inform them that you would remove the vessel?

A. No; I don't think we did. When he instructed me to remove her, there was nothing said. Capt. Burnett made a remark.

Q. What did he say?

A. He said, "We will leave her there until she rotted."

Q. Then did you, as the managing owner, ever notify the Mess. Smith whether you would or not remove the vessel?

A. No, sir; I never did.

Q. And you never notified them positively whether you would or would not abandon her there?

A. No.

Q. They were notified of the survey, were they?

A. I left that with Mr. Hagner.

Q. You don't know?

A. I don't know of my own knowledge.

Q. Do you know anything about the advertisement that was made, the record; who prepared that?

A. That, I think, was prepared by Mr. Hagner.

Q. Who directed that the \$5,000 bond would be required?

A. That was under the advice of Mr. Hagner, as we considered we were under a penalty to remove the vessel, and we sold the vessel to the party who entered into the bond to remove it. We didn't want him to take the vessel and not remove it.

Q. Why did you regard yourself as under a penalty?

A. That was what Mr. Hagner informed us.

Q. How was the sum of \$5,000 fixed?

A. He said it was fixed by statute.

410 Q. Were you present at the sale?

A. Yes, sir.

Q. Were there any bids?

A. There was one bid made on it.

Q. How much?

A. I made a bid for \$25 and some gentleman made a bid for \$30.

Q. Those were the only two bids?

A. Yes, sir; the gentleman who made the \$30 bid did not comply with the terms of sale and the vessel was bid in, and I bid \$25 again on it. There was no other bid on it at that time.

Q. Who was the party that bid \$30?

A. I don't know.

Q. In what respect did he fail to comply with the terms?

A. Mr. Hagner saw him. I did not.

By Mr. HAGNER: You were standing there?

A. No, sir; you went off the dock.

Q. Do you remember what I announced?

A. Yes, sir.

Q. What was it?

A. He did not comply with the terms to give bond for the removal of the vessel.

Q. I said that in your presence?

A. Yes, sir; on the dock, close by.

Mr. WILSON:

Q. Whose bid was it that took the vessel?

A. My bid for the owners.

411 —. And then the owners sold it?

A. Yes, sir.

Q. Were you here when the sale was made to Mr. Lord?

A. Yes, sir; I made the bargain with Mr. Lord.

Q. What day was that?

A. That was the morning after the sale—the forenoon. The sale was on the 14th, if I recollect right, and this was made the next morning—the conditional sale or bargain was made—and that after the vessel was raised we were to give him the bills of sale.

Q. Were there a lot of spars, tackle, &c., taken from the vessel and on the wharf?

A. Not that I know of.

Q. Did you ever see any there?

A. No, sir; there were some things, such as lamps, compasses, and some things of that kind, the captain told me he took out.

Q. Was there any offer for the spars and tackle?

A. Yes, sir; there was an offer made on the lighter in between the vessel and the dock.

Q. What was that offer?

A. \$300.

Q. By whom?

A. By some man in Baltimore, and I told him to give me the \$300 and he could have them, and he did not have the money.

Q. What became of those articles?

A. They went with the vessel to Mr. Lord.

Q. For \$100?

A. Yes, sir; the offer of the man from Baltimore was for what we call the outfitings, the rigging, sails, masts, &c. He was  
412 not to touch the hull of the vessel; not to have anything to do with that. The vessel was sold to Mr. Lord conditionally for \$100. He gave a bond for \$5,000 to remove it.

Q. That is, \$100 and the removing of the vessel?

A. Yes, sir.

Q. You insisted on the bond?

A. Yes, sir.

Q. Why?

A. To protect ourselves from damage. We insisted on a bond so he should remove the vessel.

Q. You considered yourselves liable for the vessel remaining in that position, and that it was your duty to get it out of the way, was it not?

A. Yes, sir; that is what I understood from Mr. Hagner.

Q. When did you see the schooner last in Georgetown?

A. The day of the sale.

Q. Which was that?

A. Which, I think, was the 14th of November, 1893.

Q. At that time, as I understand, the stone was out of her?

A. Yes, sir.

Q. Why did you postpone putting her up for sale so long—three months?

A. We wished to remove the stone first and then to determine what it would cost to raise her after that, and after I failed to get bids to raise her I determined to put her up at auction and sell her.

Q. You made no effort to sell her before November?

A. No, sir.

413 Q. You didn't offer her for sale as she lay there?

A. No, sir; not until November.

Q. You didn't take any bids?

A. No, sir.

Q. Did you make any application to anybody except to Mr. Lord for the removal of the stone?

A. Well, I made application to the wreckers, not for the stone separately, and to raise the vessel and the stone in her, I suppose. I didn't know whether they would take the stone out of her and raise the vessel. We applied to these wreckers to raise the vessel.

Redirect examination.

By Mr. HAGNER:

Q. I want to ask you if you sold the yawl-boat and how much you got for her.

A. The captain wrote on that he had a bid for the yawl-boat. I was sick, and I wrote back to sell her.

Q. How much did you sell her for?

A. \$75. The captain sold her. He wrote to me at the store—I was sick then—that he had a bid for her, and I wrote back to sell her.

Q. I want to ask you whether you made inquiry in Baltimore as to whether there was a pump there that would pump the stone out of the vessel, if you remember.

A. I sent the captain over there. I did not see; the captain did. I sent the captain over to see a wrecker, to see what could be done.

CHARLES G. ENDICOTT.

Subscribed and sworn to before me this 22 day of March, A. D. 1894.

RUTLEDGE WILLSON,  
*Special Comm'r.*

414 At the same time and place and in the presence of the same counsel also appeared WILLIAM WOODFOLK, a witness produced on behalf of libellants, who, being first duly sworn, testified as follows:

By Mr. HAGNER:

Q. What is your business, Woodfolk?

A. I am a laborer, sir.

Q. Where were you last August?

A. I was in Mr. Smith's employment last August.

Q. How were you employed there?

A. I was working on the wharf there, trimming vessels—stone vessels.

Q. What is the business of a trimmer? What does he have to do?

A. Trims stone in a vessel to keep her level—a stevedore.

Q. Under whose orders were you working?

A. I was under Mr. Speaker.

Q. How many other trimmers were there working on the Tobin there in August?

A. There were five more besides myself.

Q. Who was the boss?

A. I was the boss there.

Q. Who paid you?

A. Mr. Smith paid me.

Q. And you were under Mr. Speaker's orders?

A. Yes, sir; Mr. Speaker was my boss.

Q. Did anybody ever tell you that the captain of the vessel was your loss?

415 A. No, sir.

Q. Did anybody ever tell you to do as the captain of the vessel told you to do?

A. No, sir; I got my orders from Mr. Speaker.

Q. Were there any other vessels loaded at Mr. Smith's dock after April and before the Ellen Tobin loaded there as large as the Ellen Tobin?

A. That is the biggest vessel I loaded.

Q. You worked there all the time?

A. Yes, sir.

Q. From April to August?

A. Yes, sir.

Q. And that was the largest vessel?

A. Yes, sir.

Q. You remember when the dock was cleaned out in April?

A. Yes, sir.

Q. And that was the largest vessel loaded there from that time till she sunk?

A. Yes, sir.

Q. Do you remember of any other vessels going aground there Christmas a year ago?

A. One went aground there.

Q. Whereabouts did that go aground?

A. In the same berth.

Q. Just where the Tobin was?

A. Yes, sir.

416 Q. Was there a frost there just about the time she went aground or not?

A. Yes, sir; there was a little frost there, yes, sir.

Q. How much of a frost was it?

A. It was a skim of ice on it; it was getting on in the fall.

Q. How many frosts had you before that?

A. I don't remember how many.

Cross-examination.

By Mr. BARNARD:

Q. How long have you worked for Mr. Smith?

A. I worked for Mr. Smith a couple of years.

Q. Are you still working for him?

A. Not now, sir; I have nothing to do now.

Q. How long since you quit working for him?

A. I have not worked any for him since long before Christmas—before the time that the work got shut down.

Q. How came you to be a witness here, do you know?

A. Nothing more than what the gentleman asked me about the vessel, because I worked on it.

(Mr. HAGNER:)

Q. What I asked you?

A. Yes, sir; I worked on it.

Q. What was that boat you say was there a year ago Christmas, that you say got stuck there?

A. I could not tell the name of that vessel, sir.

Q. Where was it stuck?

A. The vessel that you talked about?

Q. Yes.

417 A. That was where we loaded, on the same berth there.

Q. Do you remember whether she was grounded or frozen in?

A. She was grounded. The captain told me she was grounded.

Q. How did they get her away?

A. By the tugboat.

Q. Didn't they break the ice with the tugboat first?

A. Well, there was a small skim of ice there. Of course the tug came up there, and of course it broke the ice then.

Q. Were you there when it pulled out?

A. Yes, sir.

Q. Did they break a hawser?

A. I disremember whether they did or not. I don't remember whether a hawser was broke.

Q. You don't remember that?

A. No, sir.

Q. Now you say you were a trimmer on the Ellen Tobin just before she sank?

A. I didn't trim on the Ellen Tobin.

Q. You did not?

A. The one sank—yes; I trimmed in that one. I thought you were talking about the other one.

Q. Whereabouts were you on the Ellen Tobin while you were trimming?

A. I was trimming on the inshore side.

Q. Were you down in the hull?

A. Yes, sir.

Q. Was there any water in it?

A. There was no water; no, sir. I didn't see any water there; she was all covered over with stone.

418 Q. She was not covered over with stone when you first went in?

A. No, sir; she was dry then.

Q. After you began to put the stone in you don't know whether she leaked or not?

A. No, sir.

Q. What were you to do with reference to trimming this boat, so far as the captain was concerned?

A. All I had to do was to ask the captain how he trimmed it—how high forward and how far back and how far aft.

Q. And you did ask him about that as you went along?

A. Yes, sir; that was my orders.

Q. And you followed those orders?

A. Yes, sir.

Q. Do you remember who were the others who helped you there to do the trimming?

A. I don't remember but two men there; the others were strangers I didn't know. I only knew two of them.

Q. Who were they?

A. One was Mike Taylor and the other was William Matthews.

Q. Colored men, were they?

A. Yes, sir.

Q. Do you remember a boat called Sunlight that was loaded there?

A. Now, boss, I could not tell the names of the vessels. I could not read.

Q. And you don't remember hearing the name and you don't remember them now?

419 A. If I heard the names I could not remember them now.

Q. Did you ever hear the name of a schooner called the Biard?

A. If I did I forget it.

Whereupon the session is adjourned to meet on Wednesday, the 4th day of April, A. D. 1894, at 3 o'clock p. m.

Signed by special comm'r per stipulation.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

Subscribed and sworn to before me this 9th day of April, A. D. 1894.

The taking of testimony is here adjourned to meet on Wednesday, March 28, 1894, at 3 o'clock p. m.

WEDNESDAY, March 28, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Randall Hagner, Esq., on behalf of libellants; Job Barnard, Esq., on behalf of respondents; the examiner, and—

CORNELIUS ECKHARDT, a witness produced on behalf of libellants, having been first duly sworn, testified as follows:

I represent the Evening Star Newspaper Company. I have here the files of the Evening Star containing the notices of advertisement of sale of the schooner Ellen Tobin. These papers  
420 show two corrections made in the advertisement. I have also the bill of the Evening Star Company for the publication, which has been paid.

Mr. HAGNER: I offer in evidence the bill referred to by witness, to be marked Libellants' Exhibit A, Eckhardt, and copies of the issues of the Star of November 2nd, 4th, 7th, 9th, 10th, 11th, and 13th, 1893.

CORNELIUS ECKHARDT.

Subscribed and sworn to before me this 7 day of April, A. D. 1894.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

At the same time and place and in the presence of the same counsel also appeared FREDERICK L. SOMERS, a witness produced on behalf of libellants, who, having been first duly sworn, testified as follows:

By Mr. HAGNER:

Q. Mr. Somers, state your name, residence, occupation, and age.

A. Frederick L. Somers; Philadelphia; contractor; age, 39 years.

Q. Mr. Somers, state where you were about April, a year ago—last April.

A. Well, I was here and in Philadelphia, both places.

Q. What were you doing here, sir?

A. I was doing work here, dredging. Part of the time I was in Philadelphia.

Q. For whom were you dredging here?

421 A. I dredged at Mr. Littlefield's dock; I could not say as to the date exactly, but I dredged for Mr. Littlefield and Mr. Cranford and Mr. Smith.

Q. That is Mr. Smith here present?

A. Yes, sir.

Q. What sort of a contract did you have with Mr. Smith for dredging over there?



A. Do you mean by the yard or by—

Q. Yes, sir.

A. I had a contract to dredge by the yard.

Q. Where was it?

A. In front of the crusher.

Q. In front of the stone-crusher?

A. Yes, sir.

Q. In Georgetown?

A. Yes, sir.

Q. Did you take all the rock out of the berth?

A. No, sir; I didn't take it all out.

Q. Were you to take it all out?

A. No, sir.

Q. Is there any rock in there?

A. We left rock in there.

Q. Did Mr. Smith ask you if you had taken all the rock out of there?

A. No, sir; I don't think he did.

Q. How far east did you go? Look at this map, which is marked "Libellants' Exhibit No. 7 in the case, prepared by Mr. 422 Brewer, surveyor, and state how far you dug from the elevator. How far east from the elevator was the cut you made?

A. This is east here (indicating)?

Q. This is the elevator, and this is the stone-crusher here (indicating). How far did you go east in cutting?

A. I can tell better in my own mind.

Q. Well?

A. In my mind there was a pile there, just about the corner of the crusher.

Q. There is one pile, and another, and there is another, and there another (indicating on exhibit). Can you tell whether it was the first, second, third, or fourth pile from the crusher going east?

A. I don't know about these—how those two are located.

Q. Well?

A. It was the third pile from the crusher.

Q. How far from the crusher was it—that pile? Look at the map and state how far that third pile was from the crusher.

A. I cannot tell it exactly in feet.

Q. About?

A. About fifteen feet. It might have been the third or fourth pile from that; I could not say positively. I don't know the measurement at all.

Q. Did you guarantee to give Mr. Smith any particular depth of water there?

A. No, sir; it was not guaranteed; it was not asked.

Q. Did you originally make him an offer to dig out the berth there or did the offer that you made him contemplate the 423 digging out of the berth there a certain number of feet first before you made the other contract?

A. Well, my recollection of it is that he showed me the berth that he wanted dredged out there. He said they wanted a berth

for vessels larger than comes here. At that time smaller vessels had been coming to the wharf, and he wanted to know what I would dig a good berth for there.

Q. Did you give him a bid?

A. I mentioned a figure, I think, at that time, but could not recollect it now.

Q. What was your subsequent arrangement?

A. Our arrangement was to dredge out by the yard, to be measured in scows.

Q. What were you to dig out there?

A. We were to dig out the mud; and crushed stone was particularly spoken of, the broken stone, the stone that came out of the long chute, whatever that is.

Q. You mention the long chute. Did that long chute stay there while you were dredging or did they remove it?

A. It was taken out.

Q. It was taken out?

A. Yes, sir.

Q. Are you familiar with the mode in which docks are generally tested, and whether they test to find out whether they have a certain depth?

A. Not scientifically.

Q. Now do they do it?

424 A. It is generally done with a lead line or pole.

Q. Do you know what a sweep is?

A. Yes, sir.

Q. Explain what a sweep is.

A. It is something dredging men don't like to have anything to do with. The Government is the only people who use it. It is the only place that I ever saw it.

Q. You have seen a sweep?

A. Yes, sir.

Q. Can you explain what it is?

A. I cannot say that I ever saw one out of water. I had the thing explained to me in this way: It is two uprights connected at the bottom and these uprights have got the figures, you know, of the depth, and they are set—not exactly set; the cross-piece is put across the stern of the boat or scow or something like that. These uprights work through a small hole.

Q. Does that represent it (counsel showing witness a paper)?

A. It is pretty near what we call a sweep. That is what I always saw on the river over here under the engineer's office.

Q. That is put over the boat, is it?

A. Yes, sir; set over the boat.

Q. There is a boat and there is the way the sweep looks with the line to it (indicating)?

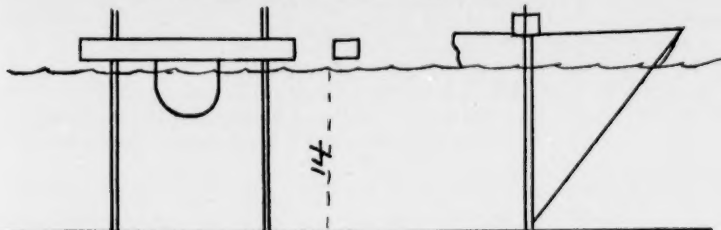
A. I don't know how the connection is done. I often wondered how it is done. But I know that if it strikes any stone or anything it bobs up.

425 Q. That represents your idea of a sweep, does it?

A. Yes, sir; that is near to it in a crude form. I never seen a sweep out of the water.

Mr. HAGNER: I offer this paper in evidence, to be marked "Libellant's Exhibit B, Somers."

LIBELLANTS' EXHIBIT B, SOMERS.



426 Mr. BARNARD: I object to the evidence as immaterial and incompetent.

Q. Now, Mr. Somers, just tell us what you did there under this arrangement by which you were to dig—did you mention the amount you were to dig out for, how much a yard?

A. No, sir.

Q. How much was it?

Mr. BARNARD: I object to that as incompetent.

A. It was  $13\frac{1}{2}$  cents—was the price.

Q. Did you dig there under that arrangement?

A. Yes, sir.

Q. Do you remember going to Mr. Smith with any complaint about there being large stone and not crushed stone—with any complaint at all about that, after digging there for a while? Do you remember going to him and making any statement about it?

A. Yes, sir.

Q. What was that?

A. It has been a good while ago; I cannot say to you what the words were.

Q. Never mind the words, give us the effect.

A. It was to the effect that there was larger stone and heavier stone in the digging than what we arranged for.

Q. What did he say in respect to that?

A. He told me, if I remember right—he told me to go ahead and he would make it all right with me.

Q. And you went ahead?

A. Yes, sir.

427 Q. At what end of the berth did you make the deepest water, Mr. Somers?

A. Well, I think we made the deepest water — the upper end.

Q. At the east or the west end?

A. At the west end, if I recollect right; the soundings ran a little deeper there.

Q. Did Mr. Smith sound in that berth before he paid you for your work?

A. I don't know, sir.

Q. You didn't see him sound?

A. No, sir; I didn't see him sound.

Q. When he paid you for *the* your work, did he pay at the rate of digging out large stones or pay you at the rate of digging out small stones?

A. He paid at the rate of  $32\frac{1}{2}$  cents.

Q. And not the increased rate for large stone?

A. No, sir; he settled for  $32\frac{1}{2}$  cents a yard.

Q. Before you came away finally, did Mr. Smith want you to do some digging on the inside, near the piling which you have spoken of?

A. My recollection is that we moved on the inside of this cut and took off a little by the wharf along there—that is, inside the main cut we made. He wanted that sloped off a little more. I remember he cautioned me to remember not to make it too deep next the wharf on account of the pressure on the wharf. He wanted me to slope off and take a little off along on the inside of the main cut.

Q. Do you remember your finally declining to do some work to the east of that piling which he wanted you to do—other work?

428 A. Yes, sir; there was some work over by the "hoister" or cranes, and we thought there was large stone in there—that is, it was understood by all it was good size stone.

Q. Point on the map where that was.

A. It was right along by the derrick.

Q. By the big derrick?

A. Above that.

Q. That stands east of the elevator?

A. It was away beyond here. I should say, judging from this map, it was up along here (indicating). I don't know the scale of this at all.

Q. The last piling is the fourth piling?

A. Where is the derrick?

Q. The derrick is near the fourth piling.

A. It was near the derrick.

Q. The big high derrick?

A. The derrick above the crusher.

Q. East of the crusher?

A. Yes, sir; the derrick east of the crusher. There was some dredging all along; we worked there——

Q. That he wanted done?

A. Yes, sir.

Q. Did you do that or not?

A. No, sir; that we didn't do.

Cross-examination.

By Mr. BARNARD:

Q. How much water did you leave by the wharf where Mr. Smith's stone-crusher is when you got through digging?

A. Well, about fourteen feet, to the best of my knowledge.

Q. What was the depth that Mr. Smith wanted made there?

429 A. There was no depth specified. He asked me to give him a good berth, and there was no particular depth—fourteen or fifteen feet was the depth mentioned at the time.

Q. How did you ascertain there was fourteen feet when you got through?

A. I am not sure there was fourteen feet all over the berth. If you ask the question with a view of being fourteen feet all over the berth, I don't know that there was fourteen feet, because I did not sound it all over the berth.

Q. Where did you take the sounding?

A. I took the sounding off the rear of the machine—the stern of the machine—about the main cut.

Q. You settled up satisfactorily with Mr. Smith when you got through the work?

A. Not entirely satisfactorily; we settled at the time.

Q. What kind of stone did you take out of there?

A. We took all kinds—that is, I say, all kinds; we took small stones and we took big stones. I don't know them by their name as stone, but I know there was a variety of kinds.

Q. Did you take out what is called rubble stone?

A. I don't know what rubble stone is?

Q. What is the largest stone you took out?

A. The largest stone we took out was the size of that safe, maybe a little bigger. It would not go through the bucket (indicating a safe about 3 x 2 x 2 feet).

Q. It would not go through the bucket?

A. No, sir.

(Mr. HAGNER:)

Q. How big was the bucket?

430 A. It was about the width of this safe, and maybe a little longer. I would say the stone was about three feet both ways. It was not a square stone; it was more of a round stone.

By Mr. BARNARD:

Q. About how many large stones did you take out?

A. Of that size, do you mean?

Q. That one the size you have just described.

A. Only one that size.

Q. What is the next larger size?

A. That I could not answer. They were not measured. All the rest of the stone that came out was stone that would not go through the bucket.

Q. Tipped up with the bucket?

A. Yes, sir. I don't know of any other.

Q. Where was this large stone?

A. I could not say. It was on our second day's digging. I judge it was along about the middle of the crusher, as near as I can recollect.

Q. When you say it was about fifteen feet from the end of the crusher, where you began digging, do you mean the bin where the stone was kept?

A. Yes, sir.

Q. You mean at the upper end, or east end?

A. Yes, sir; at the corner of the crusher.

Q. You mean by the crusher the bin where the stone is?

431 A. Yes, sir; that is the main building where the wagons go under.

Q. Did you make out any bill for any definite amount in excess of the 32½ cents?

A. No, sir; I only made a verbal request for it.

Q. What was the amount of the bill you were paid for your services there; do you remember?

A. I have it in my book; I can give it to you.

Q. Have you it with you?

A. Yes, sir; if you will allow me to refer to it. Do you want me to give you the total amount?

Q. Yes, sir.

A. \$159.25.

Q. How many yards did that represent?

A. 490.

Q. That is, you dug out 490 cubic yards of material out of the berth?

A. Yes, sir.

Q. You rendered a bill for that number of yards, I suppose?

A. Yes, sir.

Q. Did Mr. Smith offer you any more than 32½ cents?

A. He offered me at the rate of 35 cents a yard. That was what I originally asked him on the contract in the first place—that is, when we talked about the price per yard to be measured by scows.

Q. And you didn't accept that and wanted what?

A. Well, my best recollections of that now is that I told him I thought this dredging, it was pretty heavy stone, more than I expected, and I asked him, if I recollect right, to give me a  
432 day's work with the machine; that would be \$60. I think that was what I asked for on our settlement when we were making a settlement, and he said no, he could not afford to do that, but he said, I will give you the price of 35 cents; I will give you the other 2½ cents. I think that was the way it was put, and, of course, I would not accept that. It only amounted to \$10 or \$15.

Q. And you settled on the original contract price?

A. Yes, sir; we settled on the original contract price.

(Mr. HAGNER:)

Q. Of 32½ cents a yard?

A. Yes, sir.

By Mr. BARNARD:

Q. At that time what amount of water did you report to Mr. Smith?

A. I don't remember of reporting the amount to Mr. Smith.

Q. Did you make a report to Captain Lee or anybody else?

A. Yes, sir; I spoke to Mr. Lee about it, and told him I thought we had about fourteen feet of water there.

Q. Do you recollect saying fourteen feet or between fourteen and fifteen feet?

A. I don't recollect that. I don't recollect saying anything of that kind.

Q. Do you recollect Mr. Smith saying to you when you began there that they wanted you to dredge out so as to have fourteen feet of water there?

A. No, sir; I don't.

Q. Do you remember of any depth being talked of at all that you were to aim for?

A. No, sir; I think the question of depth was talked about more with Mr. Lee than it was between Mr. Smith and I.

433 Q. Did you discover anything in the bottom other than these loose stooes that you spoke of and the dirt? I mean any natural rock there you could not manage.

A. No, sir. In that class of dredging it is a pretty difficult thing for a man to find—to tell, because it was all stone, and all very heavy, and very heavy digging, and the bucket would jump from one stone to another, and sometimes you came up with one, two, or more stones, and sometimes with none, and because it was pretty hard we could not tell whether we were bumping against natural rock.

Q. There was a good deal of mud?

A. No, sir; not very much.

Q. You got up some mud?

A. The bulk of it was stone digging?

Q. From the appearance of these stones could you tell how they came to be there in the river or whether they were there naturally or not or dropped there?

A. I could not tell. Understand, I was not on that work all the time myself to see everything that was going on there. I spent the greater part of my time there, but not all my time.

Q. Were all these boulders round ones?

A. Yes, sir; that big one was a round stone. I don't mean a round stone, but it looked like a natural stone.

Q. What you would call a boulder?

A. Yes, sir; it was flat on one side.

Q. And the smaller stones, had they sharp points or round?

434 A. I would say sharp points, a good deal, and, of course, the stone came up dirty, a good deal of it.

Q. Do you recollect of making any statement at all to Mr. Smith at the place there as to the depth of water when you got through?

Mr. HAGNER: At what place?

Q. At the wharf.

A. Do you mean a statement of the depth of the water—of the depth from one end to the other?

Mr. BARNARD:

Q. Where you dug—where you dredged.



A. I did not. I confess I do not recollect mentioning the depth to Mr. Smith.

Q. Or to his foreman?

A. No, sir.

Q. What depth were you trying to make there?

A. I gave my men orders to make fourteen feet of water.

Q. Where did you get your request to make fourteen feet of water from?

A. Well, I would say this: that from a conversation that was carried on in Mr. Lee's office—he made a remark to Mr. Smith that he ought to make fourteen feet of water there; he ought to make a good berth.

Q. That is the conversation you overheard between Mr. Smith and Mr. Lee in Mr. Lee's office?

A. Yes; that is my recollection of it.

Q. What did Mr. Smith say in response to that, if you remember?

A. I don't remember.

Q. You heard that in an ordinary conversation, and from that conversation you got the idea that you had to dig out—

A. My impression was to dig out fourteen feet of water.

435 Q. And what is your judgment as to having that amount of water when you got through?

A. My judgment is we had about fourteen feet of water and as far as I sounded I know we had over that in some places; fourteen and one-half and fifteen feet in the upper end of it, but I didn't sound all over that work, and, of course,—thing else we depend upon our men to do what we tell them to do, and it was naturally supposed they carried it through. The machine was laying in the berth, at the upper end of the berth, when I took the last sounding. The dredge was lying in the berth in this position; here is the cut working up here. I sounded on the last day when we finished up, across her stern.

(Mr. HAGNER:)

Q. She was heading toward the east end of the berth?

A. Yes, sir.

(Mr. BARNARD:)

Q. Wherever you did sound in this cut, however, you had not less than fourteen feet of water when you got through?

A. That is correct, sir.

Redirect examination.

By Mr. HAGNER:

Q. How many soundings did you take?

A. I could not say?

Q. About?

A. I took a good many.

Q. Ten or fifty?

A. Ten fully, ten and over.

Q. Not less than twenty?

436 A. Ten and over, I said.

Q. More than twenty?

A. I could not tell how many I took.

Q. More than thirty?

A. I could not say, sir, because this is one of the things I could not remember, and if I make a move I take a lead line and throw it across the stern.

Q. Did you sound in a small boat at all?

A. No, sir.

Q. And you sounded without any sweep?

A. Yes, sir.

Q. After all is said and done, Mr. Somers, as I understand it, the fact remains that you went to Mr. Smith's to dig small stone by the yard; that you settled for small stone by the yard, is that so?

A. Not altogether, sir. It was represented to me that there was some large stone like what was on the lighter at the time; but as my understanding of it was the bulk of it was small stone. I could answer that in that way if you will allow me to do so.

Q. When you went and complained to Mr. Smith that the stone was larger, and that you ought to have an increased rate of digging; that it was larger than you anticipated, and he said he would make it all right with you; is that right?

A. I went to him—I didn't make a demand of him—I went to him and told him this was turning out bigger stone than we had counted on, and rather complained like as a man would in that position, and Mr. Smith said, That is all right; we will make it all right with you.

Q. And in making it all right he wanted to give you \$15 instead of \$60?

437 A. He wanted to give me \$15, but I am not positive about  
6  
the \$10, and, as I said before, I think a day's work was a fair compensation in addition to what the contract was, and that is \$60 or \$65.

Q. But you could not get him to agree with you?

A. No, sir; I am sorry to say I could not.

Q. The first conversation that you had in respect to this work at all was in Mr. Lee's store. Was it, do you remember, in the presence of Mr. Smith and Mr. Lee?

A. Well, I don't know. I am not sure about that; but I think it was he first spoke to me about dredging in that store, and he told me that he would have some dredging to be done at that time.

Q. And Mr. Lee said to Mr. Smith, You might as well have a good berth in there while you are about it?

A. Well, I am not sure that is the first time we talked about it.

Q. That was said in the store?

A. That was said in the store previous to the time the dredging was done.

Q. And previous to the time you made your contract for dredg-

ing there was never any contract or agreement for dredging previous to the time you made your oral agreement for dredging?

A. No, sir.

Q. Then after that you and Mr. Smith made your agreement for digging there by the yard?

A. Yes, sir.

438 Q. And you just previously offered him an arrangement by which you would dig the berth out to a certain depth, and he refused that and accepted the terms of digging by the yard. Is that about the size of it?

A. That contract, part of it, is not very clear in my mind, but there was a figure mentioned where I told him I would dig the cut out for so much money.

Q. And to a certain depth?

A. Yes, sir.

Q. And then he did not accept that, but told you to dig by the yard. He employed you to dig by the yard?

A. We took it by the yard.

Q. By the yard, to be measured in scows?

A. Yes, sir.

Recross-examination.

By MR. BARNARD:

Q. Had you ever dredged at that place in the river before that?

A. Yes, sir; we dredged for Mr. Smith before that; we dredged under the crusher. I don't remember whether we dug that cut or not, but it seems to me we did. It seems to me we dredged out there and took off two or three feet at that time.

Q. Do you remember how the price was regulated at that time for digging?

A. I think so.

Q. 35 cents a yard?

439 A. Yes, sir; I think it was 35 cents; I am not positive of that, sir; I could not tell that; it has been some time ago; but I know there was some contract with Mr. Smith that was for a lump sum, so much money for dredging. Whether that is the time or not I don't know. If there was a lump sum for dredging, there must be a certain amount of depth mentioned, for if somebody goes in there and asked us to dig for two or three feet and they asked me how much water there is in there and I say I don't know—we don't always fix on the depth.

Q. In digging every time your bucket goes down it indicates the depth you are digging?

A. Yes, sir.

Q. So you can tell in a general way when you are dipping yourself what the depth is as you are going along?

A. Yes, sir.

## Redirect examination.

By Mr. HAGNER :

Q. How long ago had you done digging for Mr. Smith before under the former contract?

A. I could not tell you here.

Q. How many years ago was it, about, generally?

A. I don't remember whether it was the year before or the year before that. It was either two or three years before. I could not tell that without referring to my books.

Q. And that was for a lump sum?

A. I confess to say I am afraid to answer that question about that work, because I didn't think I would be asked anything of that kind. We have to go on so many different jobs, and I came  
440 here unprepared to answer these questions. I am not prepared for it.

Q. You remember that on the occasion of your digging, about April last, that the bucket was striking against things and slipping?

A. Yes; it would jump over rocks.

Q. And sometimes it would come up empty and you would put it down again?

A. Yes, sir.

Q. Then you might get something and then you might not; is that it?

A. Yes, sir; that is the way it goes when rocks are around.

Q. When rocks are around?

A. Yes, sir.

## Recross-examination.

By Mr. BARNARD :

Q. In the various times you have dredged in front of this wharf and in going back and forth over the river there have you ever discovered any obstructions in the river other than the ordinary bottom there?

A. Do you mean dredging that berth or other berths?

Q. In a general way.

A. To my knowledge, I have never. I have struck stone in Mr. Cranford's; I have struck stone; big stone.

Q. You never struck big stone in this berth that you know of?

A. I have struck hard stone; how big they were I could not answer. We cannot tell what is on the bottom when our bucket slips over it.

## 441 Redirect examination.

By Mr. HAGNER :

Q. Mr. Somers, is it not a fact that that berth is rocky from one end of it to the other; that it is a bed rock?

A. What do you mean by bed rock?

Q. Solid rock from one end of the berth to the other—the whole business.

A. I don't know.

Q. Is it not a rocky bottom all the way across?

A. Yes, sir.

Q. It is a rocky bottom from one end of the berth to the other?

A. Whether it is rock off scows, loose rock, or what it is, I cannot tell. We cannot go down on the bottom.

Q. But it is rocky from one end to the other?

A. Yes, sir; it is rocky from one end to the other.

It is stipulated that the examiner may sign the testimony of the above witness.

RUTLEDGE WILLSON,

*Sp'l Comm'r,*

P'r FREDERICK L. SOMERS.

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WEDNESDAY, *April 4th*, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same counsel.

Whereupon it was stipulated that the examiner sign the deposition of William Woodfolk, a witness who testified at the last session.

Whereupon CHARLES W. DARR, a witness produced on behalf of the libellants, being first duly sworn to testify the truth, deposes and says:

By Mr. HAGNER:

Q. Please state your name, age, residence, and occupation.

A. 32 years of age; name, Charles W. Darr; occupation, auctioneer; member of the firm of Ratcliffe & Darr, and I reside at 708 7th St. N. E., in the city of Washington, D. C.

Q. Please look at Libellants' Exhibit A, Eckhardt, and state if you know anything about that.

A. Yes, sir. I attended and cried the sale of the boat and out-fittings mentioned in the advertisement attached to the exhibit, and sold it for the owners for \$25.

Q. Mr. Darr, did you know of any large placards of the sale being put there?

A. Yes, sir.

Q. Who prepared them?

A. Mr. Ratcliffe prepared them.

443

Q. You saw him do it?

A. Yes, sir.

Q. And did you see those printed notices there?

A. I saw a majority of them when I arrived on the wharf.

Q. Do you remember where they were?

A. There were two on the boat that could be seen and read.

Q. Do you remember where they were?

A. On big barrels on the boat.

Q. How large were these placards?

A. Very nearly the size of the top of that desk; good sized.

Q. Two by three feet?

A. I cannot remember.

Q. Two or three feet?

A. Fully two or three feet.

Q. Square?

A. Yes, sir; square.

Q. Do you remember seeing any other placards there?

A. Yes, sir; there was a printed placard there.

Q. Where was that?

A. I saw one on the warehouse as we entered from the foot of High street when we drove into the wharf, and I saw another on the boat-house, which I think was a tool and boat-house combined.

Q. And where else?

A. There was another on an entrance. I don't know how to describe the entrance to the wharf on Water street.

Q. Did you see any placard on the stone-crusher?

444 A. Yes, sir; the stone-crusher shut down before the sale commenced—that is, the building in which the stone-crusher is housed.

Q. Mr. Darr, how was that sale conducted?

A. What do you mean; as to fairness?

Q. Yes.

A. It was a fair sale.

Q. Was there any other bidders?

A. Were there any other bidders beside Mr. Endecott?

Q. Yes.

A. Yes, sir.

Q. Who else bid?

A. I don't remember the gentleman's name. When I went after him to get his name he told me what his name was and who he was buying for. He was buying for Tenny, and he refused to comply with the conditions of sale.

Q. And what did I do then?

A. You ordered it to be sold.

Q. What did you do?

A. I went back to the place where I had been standing at the sale after Mr. Tenny's agent refused to comply with the terms and Mr. Hagner ordered the vessel offered again, and I cried the sale again, stating the terms, conditions, etc., as in the former case and sold it to Mr. Endicott for \$25.

Q. Do you remember what the man's bid was who represented Tenny; you say he represented Tenny?

A. \$30.

Q. Do you remember seeing Mr. Smith there?

445 A. I might have been introduced to Mr. Smith on the wharf, but I am not sure.

RUTLEDGE WILSON,  
*Sp'l Comm'r.*

It is stipulated by counsel that the examiner sign the testimony of the witness.

At the same time and place counsel for libellants, RANDALL HAGNER, appeared as a witness on behalf of libellants, who, being duly sworn, testified as follows :

Since testifying before I find that I was laboring under the error that Mr. Endicott could testify to several matters which I find could only have been testified to by the captain or myself. I had this whole responsibility of raising the schooner upon my shoulders for some time, and one of the principal troubles which I anticipated was in getting her through the draw of the Long bridge in case of her being raised. I became convinced that for the safety of the owners it would not do to let her remain anywhere between the aqueduct and the Long bridge, because if a freshet should arise, which would have been very likely at that season of the year, she would have been carried against the Long bridge, in all probability, and the owners would have been liable, in all probability, to the Pennsylvania railroad for any injury by reason of her striking the Long bridge in the time of a freshet. Realizing that it would be impossible to get the schooner, with the pontoons attached,  
446 through the draw, I became convinced that it would be necessary, in case of her being raised with the stone in her, either to repair her first before taking her through the draw, or that it would be necessary to take her across the river somewhere and blow her up, and in that event had the stone remained in her we would have been at an equal expense in pumping the stone out after she had been raised as if we had pumped the stone out first and raised her afterwards. That is the reason that I said in my last examination that I considered it would take at least ten thousand dollars to get rid of her.

In respect to the advertising of the vessel, she was fully advertised, as was already shown, and the placards that Mr. Darr has testified to were on that vessel from the first day of the advertising, which, I think, was the 1st day of November, until the 14th of November, the day of sale, as were also the handbills, from the 7th of November.

There is no port warden in the District of Columbia.

MR. BARNARD: The respondents object to the testimony just given by Mr. Hagner on the ground that it is argumentative and a matter of opinion.

MR. HAGNER: Mr. Hagner says that all testimony, so far as he understands, in respect to maritime matters in case of accident or injury of vessels is of that character.

No cross-examination.

RANDALL HAGNER.

Subscribed and sworn to before me this 9th day of April, 1894.

RUTLEDGE WILSON,  
Sp'l Comm'r.



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## LIBELLANTS' EXHIBIT A.

WASHINGTON, D. C., *August 24th*, 1893.

Chas. G. Endicott, Esq., Jersey City, New Jersey.

DEAR SIR: Messrs. C. G. Smith and Sons, operating the Potomac Stone Company's works in this District, request us to say to you that the schooner Tobin, which sunk in the river opposite their wharf while loading with stone, and which schooner belongs to you, is a hinderance and damage to them in their business, and they request that you remove the same as early as you can do so; otherwise they will be obliged to hold you responsible for all damage caused by allowing the vessel to remain longer in their way. They are willing to assist all they can in the matter of unloading or raising the boat; but the responsibility for the boat's sinking and being unable to carry the freight which they undertook to do is disclaimed by our clients, and must rest wholly with you or the master of the boat.

Yours very truly,

EDWARDS &amp; BARNARD.

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It is stipulated that if Mr. Caton was here he would testify in reference to the question in Alexandria as follows:

Copy of his letter to Mr. Hagner as follows:

"James R. Caton, attorney and counsellor at law, 111 S. Fairfax street, Alexandria, Va.

ALEXANDRIA, VIRGINIA, *March 8th*, 1894.

At the request of Randall Hagner I state that we formerly had a port warden at Alexandria, and that when a survey of a vessel was desired it was the practice to have him call a survey.

Since, however, the office of port warden was abolished it has been customary to have the deputy U. S. collector call the survey.

JAMES R. CATON,

*Att'y-at-law.*"

The letter of Messrs. Edwards & Barnard, who were at that time acting as attorneys for Messrs. Charles G. Smith & Son, dated August 24th, 1893, is here admitted in evidence, marked Libellants' Exhibit A, Edwards & Barnard.

It is admitted that at that time Messrs. Edwards & Barnard were the only counsel in the matter of the *Elen Tobin* for Messrs. Charles G. Smith & Son, Mr. Nathaniel Wilson not having appeared until the answer to the libel was filed.

The taking of testimony was continued to Wednesday, April 11, 1894, at 3 p. m.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

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Whereupon the session was adjourned to meet on Wednesday, the 11th day of April, 1894, at 3 o'clock p. m., at the same place.

WEDNESDAY, *Ap'l 11th*, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Mr. Hagner, on behalf of libellants, and Mr. Wilson, on behalf of respondents.

Whereupon EDGAR P. WATKINS, a witness produced on behalf of libellants, being first duly sworn, deposes and says:

By Mr. HAGNER:

Q. Please state your name, age, residence, and occupation.

A. Edgar P. Watkins; 42 years of age; residence, Montgomery Co., Md.; occupation, special deputy clerk, custom-house, Georgetown.

Q. (Handing witness paper.) Counsel for libellants, handing witness the paper dated Oct. 30th, 1893, in quintuple, marked Libellants' Exhibit D, Hagner, asks the witness if that is his signature at the bottom of that paper.

A. Yes, sir.

Q. What does that say there, Mr. Watkins?

A. E. P. Watkins, special deputy clerk.

Subscribed by the examiner for the witness by stipulation of counsel.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

450 At the same time and place and in the presence of the same counsel also appeared PARK AGNEW, a witness produced on behalf of libellants, —, being first duly sworn, deposes and says:

Mr. HAGNER: Mr. Agnew is offered to prove what has taken place since his last examination here; otherwise it would be improper.

Q. Mr. Agnew, you were examined in this case before, I believe?

A. Yes, sir.

Q. I want to ask you whether anything has taken place in respect to the Ellen Tobin since your last examination.

A. She has been sold.

Q. Have you testified before who the owner was?

A. The Marine Railway, Shipbuilding and Coal Co.

Q. They have sold the Ellen Tobin?

A. Yes, sir.

Q. To whom?

A. John A. Curtis, of Richmond, Va.

Q. For how much?

A. For one thousand dollars.

451 Cross-examination.

By Mr. WILSON:

Q. Where is the vessel now?

A. On the railway of the Marine Railway, Ship Building and Coal Co.

Q. For what purpose?

A. For repairs.

Q. How long have you been at work on it?

A. She is now on the railway for repairs by the Marine Railway, Ship Building and Coal Company.

Q. How long will it be before the repairs will be completed, probably?

A. Well, that depends very much upon the kind of weather we have. When she was placed on the railway, with average weather, it was supposed she might be completed by the first of May.

Q. After you bought her and between that time to the time you sold her, what, if any, repairs were made on her? What change was made in her condition?

A. There was about \$100 spent on her, in order to put her overboard. She had been on the railway from the time we purchased her from Mr. Lord on the railway.

(Mr. HAGNER:)

Q. What then?

A. Then she lay there for a while, probably six or seven weeks—eight weeks—and I thought there was no opportunity of selling her, and, as we were coming to the season of the year when we required the railway, I spent this money on her to get the use of this railway, and, after we put her overboard, we sold her to this Richmond party.

452 (Mr. WILSON:)

Q. Did she leak after you put her overboard?

A. Nothing to speak of. We didn't calculate she would leak after we put her overboard.

Redirect examination.

By Mr. HAGNER:

Q. Is the railway company doing the repairs for its present owner, John A. Curtis?

A. Yes, sir.

Q. Under what sort of an arrangement, Mr. Agnew?

A. Day's work.

Q. Day's work?

A. Yes, sir.

Q. How long do you think it will take to repair her?

A. Well, we think we may complete her by the first of May, provided we have good weather.

Q. Have you taken her bottom out or any part of it?

A. I haven't looked at it; yes, sir; they are cutting out all that work.

Q. They are cutting out?

A. Yes, sir.

Q. How much of her bottom ?

Mr. WILSON: The witness says he has not seen it, and I object to his testifying about it.

A. I could not answer that.

453 Q. How much of her bottom would have to come out, Mr. Agnew ; what length of her ?

A. Well, I have no reason to change my previous testimony in that respect.

Q. I think you testified before that 50 feet would have to come out ?

A. 50 feet.

Q. That will have to be done ?

A. That is the present impression ; it has not progressed far enough.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

It is stipulated that the examiner sign the testimony of this witness.

Whereupon an adjournment was taken to meet on Wednesday, the 25th of April, A. D. 1894, at three o'clock, at the same place.

WEDNESDAY, April 25th, 1894.

Met pursuant to adjournment last noted.

Present: Randall Hagner, Esq., proctor for libellants, and Job Barnard, Esq., proctor for respondents, whereupon—

THOMAS BERRY, a witness of lawful age, produced and sworn on behalf of libellants, testified as follows :

By Mr. HAGNER:

I am 61 years of age ; ship carpenter by trade, and I reside in Alexandria, Va.

I am foreman of the Marine Railway Co., of Alexandria.

454 Q. Is that the only ship yard on the Potomac river ?

A. It is the only ship yard and the only railway on which you can put a ship, but there are some small ones on which you can put a tug.

I know the schooner Ellen Tobin. She is on the marine railway at Alexandria, where she is being repaired.

Q. What have you done with her so far ?

A. We have not done a great deal with her so far ; we are tearing her up.

Q. How about her keel ?

A. We have taken her keel out—that is, about 50 feet of it.

Q. How about her keelson ?

A. Three tiers of keelsons in depth we have taken out.

Q. Give the length of the keelsons that you have taken out.

A. There is one piece of keelson about 55 feet long ; the other will run between 60 and 70 feet ; that will have to be put in in two pieces ; the third is between 50 and 60 feet long.

Q. What about her outside planking?

A. We have taken that out from 35 to 50 feet. We have taken out 11 widths of planking on each side, besides the garbage strake, or about 15 feet of planking on each side.

Q. What part of a vessel do you call her "back"?

A. The keel, keelsons, and well logs.

Q. The way you are repairing the Tobin, are you going to put in any centerboard?

A. No, sir.

Q. Would there be any additional cost in putting the centerboard in her.

455 A. Yes; I think there would.

Q. How did you get out all the wood you have taken out of the Tobin?

A. With mauls, iron wedges, cross-cut saws, and other things. It was mostly sawed out in small pieces.

Q. What was the condition of the wood that you took out of the Tobin?

A. It was very sound, so far as I have gone.

Q. What would you say was the condition of the Tobin as to how she was built?

A. I should judge she was a well-built vessel. She had very heavy timbers.

Q. What kind of wood was her keel and keelson made of?

A. Her keel was of oak and her keelsons of Southern pine.

Q. Take this cross-section model, Mr. Berry, and state what the lead-pencil lines you have made on it represent.

A. Witness, taking a wooden cross-section model handed him, says: These lines represent about the way in which she was injured. One of these marks on it would represent, as well as all of them, the way. Near about the center of the vessel for 2½ or 3 feet she was shoved up. The top of this table would represent the straight line of her keel, and then from the middle she was bent up for 2½ or 3 feet.

Q. And that was for a space of about how long?

A. From 40 to 50 feet.

By Mr. HAGNER: This cross-section is here offered in evidence, with the lead-pencil marks on it, and marked Exhibit Berry No. 1.

456 Q. Can you handle a vessel of the size of the Tobin in a river as well without a centerboard as you can with one?

A. No, sir; I should judge you could handle one better with a centerboard in a narrow river, unless she had a very deep keel, because if she was beating to the windward she would hold better to the wind.

Q. On a flat or in shoal water you could not raise a keel, could you?

A. No, sir.

Q. If you had a centerboard you could raise it, couldn't you?

A. Yes, sir.

## Cross-examination.

By Mr. BARNARD:

Q. What experience have you had in sailing vessels?

A. None in sailing, or very little.

Q. What experience have you had in building vessels with or without centerboards?

A. Every vessel I ever built had a centerboard except one, a tug-boat.

Q. Did you ever build a schooner as large as the Ellen Tobin?

A. No, sir; I have worked on them, but never superintended one as large as she is.

Q. Who are you doing the repairs for on the Ellen Tobin?

A. A party in Richmond. His name is Curtis, I think.

Q. What use does the present owner propose to make of her, if you know?

A. I don't know myself, personally.

Q. By whose directions are the repairs being made, leaving out the centerboard?

457 A. Mr. Curtis.

Q. Can you tell us whether or not it would cost more to restore the Ellen Tobin as she was with centerboard or in the manner in which you are now restoring her?

A. It would cost more with the centerboard. There is a tremendous amount of timber in a centerboard and well.

Q. How much would she cost to repair her with a centerboard?

A. I believe it would cost between \$6,000 and \$7,000 to fix her up with the centerboard; six thousand dollars to fix her up as she is being fixed, and it would cost more to fix her up with the centerboard.

Q. How are the repairs being made, by contract or in a lump sum, or how?

A. By day's work. It is a hard matter to contract for old work like that.

Q. Then what you state as to her cost is a mere matter of judgment, is it not?

A. It is a matter of judgment, and I have figured on it besides.

Q. How much, according to your figures, will the repairs now being made cost?

A. I judge about \$6,000. I figured on the timber and the time. I think it was \$5,580 or \$5,680. I did not put in the railway charges. It was last winter when I figured it out, and I put it down pretty cheap. All hands were out of employment, and we were going to club together and do the work.

Q. Did you find any rotten or unsound timber so far in the vessel?

A. No, sir; I haven't found any so far yet; not down in her bottom, where I have been cutting, not any of any account.

458 Q. Did you see any in the planking?

A. No, sir; the planking was sound.

Q. How about the inside planking?

A. The ceiling is good—tolerable fair. Some of her lower decking is a little worn, but very little of it, and some of her upper decking is a little worn.

Q. Did you notice any rot around the pins or spikes that fastened the vessel together?

A. No, sir; I have noticed one or two spikes there, as far as I examined them, that had corroded or rusted; that you could run a knife in, but there are very few spikes in her. She is put together with treenails or wooden pins, but the spikes we have cut out are sound. The upper part of the vessel I have not examined yet, only to take the plank out so far as the butt went.

Q. How far could you stick a knife or knife handle in the holes where the pin or spike had caused the rot?

Question objected to on the ground that the witness did not say that there were any holes about the pin or the spike, and, further, that he did not say that there was any rot about the pin or spike, but merely stated that in one or two places where the spikes had rusted you could put in a knife blade.

A. I don't know whether I put the knife blade in more than half an inch or so. Mr. Smith (here present) was down there, and one of the bolts in the plank way up forward of the break in the vessel, he ran a knife blade in and called my attention to it. I don't know how far he ran it in; maybe half an inch and maybe an inch.

459 Q. In this hole where the knife was inserted was there any of the spike or iron left?

A. Well, I don't know. The head of the spike was rusted. The plank is  $3\frac{1}{2}$  inches thick. I ran my knife around the head of the spike. There was iron there. I did not thoroughly examine it. I don't know how far the corroding went in. I have not got that far yet. I noticed, though, that the butt was secure. It had not started any.

#### Redirect examination:

Q. How long had the Tobin been on the ways this last time?

A. She was hauled out about Friday, March 30. She had been overboard, after being patched up, a week or two.

Q. How far up was this place in which Mr. Smith inserted the knife?

A. I don't know exactly.

Q. How long before you patched the Tobin up and put her overboard that time had she been allowed to remain dry on the railway?

A. She laid there a couple of months the first time I hauled her out.

Q. That would necessarily, then, cause her planking to shrink anyhow, would it not?

A. Yes; a little.

THOMAS BERRY.



Subscribed and sworn to before me this 25th day of April, 1894.  
RUTLEDGE WILLSON,  
*Special Comm'r.*

The taking of testimony was here continued to next Wednesday, at same time and place.

460 WEDNESDAY, May 9, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted. No witnesses appearing, the examiner notified counsel for the respondents not to appear, and that the case was continued until Wednesday, May 16, 1894, at the same place and at the hour of 3 o'clock p. m.

WEDNESDAY, May 16, 1894—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Randall Hagner, proctor for libellants, and Job Barnard, proctor for respondents.

Whereupon ANDREW STEVENS, a witness produced on behalf of libellants, being first duly sworn, testified as follows:

By Mr. HAGNER:

Q. State your name, age, residence, and occupation.

A. My name is Andrew Stevens; age, 31; residence, # 202 Hamilton avenue, Baltimore; occupation, sailor.

Q. Stevens, were you ever aboard the schooner Ellen Tobin?

A. Yes, sir.

Q. When?

A. I shipped aboard of her in New York the 21st of July, coming to Fort Washington.

Q. When was that?

A. Last year.

461 Q. 1893?

A. 1893.

Q. How was she loaded then?

A. She was loaded with cement.

Q. Was she loaded when you went aboard?

A. Yes, sir.

Q. What was her condition from the time you went on her till the time you got to Smith's wharf in Georgetown?

A. She was a strong, seaworthy vessel.

Q. Was she leaking any when you went on her?

A. Yes, sir; she was leaking a little, but nothing to amount to anything. The men tried the pumps, but could not get anything out of her.

Q. Going from Fort Washington to Georgetown?

A. No, sir.

Q. When did she begin to leak?

A. Early Sunday morning; some time Sunday morning.

Q. Was it the same day she sunk?

A. Yes, sir; the same day she sunk.

Q. Were you aboard of her while she was lying at Georgetown?

A. Yes, sir.

Q. Was she pumped regularly while there?

A. Yes, sir; and she was not leaking until that morning. We tried the pumps and could not get anything.

Q. You did not get out any water when at Georgetown?

A. We could get a little.

Q. How many strokes would you pump before she would suck?

462 A. Sometimes twenty five or fifty strokes.

Q. You mean between twenty-five and fifty?

A. Yes, sir; about that.

Q. Did a flaw strike her when she was on the river?

A. Yes, sir.

Q. What did that do on her?

A. It carried away one of the head chains and broke her rear boom.

Q. That is the boom on the rear sail?

A. Yes, sir.

Q. What do you call it?

A. The spanker boom.

Q. Where does that head chain run from?

A. From the bowsprit down to the stem.

Q. Would these injuries affect the body of the vessel at all?

A. No, sir; they would not.

Q. Did you hear the foreman on the wharf say anything to the captain about breasting the vessel off?

A. Yes, sir.

Q. What did he say?

A. He said he was going to get another scow in there and another pole to breast her off with.

Q. Did he do it?

A. No.

463 Cross-examination.

By Mr. BARNARD:

Q. You say the Ellen Tobin was leaking at the wharf Sunday morning?

A. Yes, sir.

Q. What was the cause of her leaking?

A. She was aground with a hole in the bottom of her.

Q. With a hole in the bottom of her at that time?

A. There must have been, because she was not leaking until then.

Q. When did she get aground?

A. That is hard to tell. I don't know anything about that.

Q. You don't know she was aground then or not?

A. I know she was aground then.

Q. Sunday morning?

A. Because we could see the deck was lifting then.

Q. Didn't you try to get the water out of her then with pumps?

A. We put all the pumps agoing.

Q. There was too much water, then, to get her out with the pumps?

A. No, sir; we could not get the water out with the pumps; we had good pumps, too. It gained too fast.

Q. Didn't she settle down after that—break and settle down?

A. She settled all the time.

Q. She was aground in the first place, and she sank more afterwards?

A. I don't know whether she did or not.

Q. She leaked a little coming over with the cement?

A. Just a little; nothing to amount to anything. We had pretty rough weather, too, coming down.

464 Q. Where did you sleep?

A. Forward.

Q. Were you on the boat Saturday night?

A. Yes, sir.

Q. What time did you go to bed?

A. I don't know exactly; I didn't think anything about it; I don't know what time; I don't know. I was on shore a while, but I know I was aboard that night.

Q. Do you know whether the vessel was afloat that night or not?

A. I don't know.

Q. When did you first discover she was aground?

A. We discovered it in the morning when we saw her leaking and going down all the time.

Q. What time in the morning did you begin pumping?

A. Seven or half past seven; I could not exactly say.

Q. Did you discover she was aground before that?

A. I never had anything to do with it. I don't know whether she was or not; that is none of my business; I don't know anything about that.

Q. What were your duties?

A. I slept on her.

Q. You were not down in the hold; you don't know what was the cause of her leaking, of your own knowledge?

A. I was down in the hold.

Q. What for?

A. I went down there. The captain said, We will pump her out there; and me and the other fellow started to pump and pumped a while.

465 (Mr. HAGNER:)

Q. Who was the other fellow?

A. This man here—Thompson (the succeeding witness). I went down there, and when I come up I says, There is too much water in her, and I went down and come up again, and I says, There is two feet of water on top of her skin—that would take three or three and one-half feet in her—so I says, There is two feet of water in her forward, and the captain came to help us pump and the cook came and

helped to pump, and we pumped—the four of us—and this fellow went down and he came up and went down again, and he said she gained six or eight inches in a short while.

Q. This was in the fore part of the boat?

A. Yes, sir; in the fore part of the boat—in the forehatch; it was intended to keep her up, but we could not do it; we plugged her scupper holes, but could not do it.

Q. You say you heard somebody tell the captain he was going to breast her off?

A. Yes, sir.

Q. When was that?

A. That is something I cannot tell. I know I heard it; this was this foreman on the dock there; he said he was going to get another pole and scow and wheel it aboard.

Q. Wheel what aboard?

A. The stone. The captain says, Why didn't you let me know this before, and I would not have run any risk if I had known you were going to do that.

Q. That is when the vessel went aground?

A. When the vessel went aground; yes, sir.

466 Q. How long did you stay there after the vessel sunk?

A. I stayed there a couple of days—three days, I guess.

(Mr. HAGNER:)

Q. Three days.

A. Two or three days.

Q. Was this the same day she sunk you heard this?

A. That is more than I can tell.

Q. Was it Monday or Sunday?

A. I don't exactly know what day it was; I cannot say that.

Redirect examination.

By Mr. HAGNER:

Q. You say you were there when she broke?

A. Yes, sir.

Q. Did you hear her break—could you hear her break?

A. Yes, sir.

Q. What did it sound like when she broke?

A. She was cracking all over; she was hanging on the stone and both ends dropping and going up in the middle.

Q. Did she make a noise?

A. Yes, sir.

Q. A very loud noise?

A. Yes, sir.

Q. Did the little leaking that you spoke of while the cement was in her affect any of the cement?

A. Not a bit; every barrel was just as dry as it could be.

467 Q. Every barrel was as dry when you got to Fort Washington as it could be?

A. Yes, sir.

Q. Where are the scupper holes of a vessel?

A. The scupper holes are right forward.

Q. Upon the decks?

A. Not those scupper holes. You see the scupper holes are down four or five feet.

Q. From the railing of the vessel?

A. Yes, sir.

Q. And at the bow?

A. Yes, sir; down in the windlass-room.

Q. What are these scupper holes for?

A. When the water comes up through the howser pipes it lets it out again.

Q. And that lets the water out again?

A. Yes, sir.

Q. What is the hawser pipe for?

A. That is to let the anchor down.

Q. And the hawser hole?

A. For the chain to run through.

Q. For the anchor and the hawser that holds the anchor?

A. Yes, sir.

Q. What did they call you aboard the vessel?

A. They called me Andy.

It is stipulated by counsel that the commissioner sign this deposition for the witness.

May 10, '94.

RUTLEDGE WILLSON,

*Sp'la Comm'r,*

For ANDREW STEVENS.

468 At the same time and place and in the presence of the same counsel also appeared MARTIN THOMPSON, a witness produced on behalf of libellants, —, being first duly sworn, testified as follows:

By Mr. HAGNER:

Q. What is your name?

A. Martin Thompson.

Q. What is your age?

A. Twenty-three.

Q. Where do you reside, Mr. Thompson?

A. I live in Brooklyn.

Q. What is your occupation?

A. Sailor.

Q. Were you ever aboard the schooner Ellen Tobin?

A. Yes, sir.

Q. Where have you been since leaving the Ellen Tobin?

A. I have been on a couple of steamers.

Q. Where did they go?

A. Down to Mexico.

Q. How many trips to Mexico did you take?

A. Two trips.

Q. That is since you were on the Ellen Tobin ?

A. Yes, sir.

Q. When did you ship aboard the Ellen Tobin ?

A. In July, I guess.

469 Q. Did you ship the same time that Andy Stevens shipped ?

A. Yes, sir.

Q. Where were you when you shipped ?

A. In New York.

Q. Did you come around from New York on the Ellen Tobin ?

A. Yes, sir.

Q. To Fort Washington ?

A. Yes, sir.

Q. Was she loaded when you went aboard of her in New York ?

A. Yes, sir.

Q. What was she loaded with ?

A. Cement.

Q. What was her condition from the time you went on board till you got to Smith's wharf, in Georgetown ?

A. In good condition—a good and tight vessel.

Q. Was she leaking any while you were on her, coming from New York to Fort Washington ?

A. No, sir; she was not leaking—anything to amount to anything.

Q. Did you see her pumped out at all ?

A. Yes, sir; I seen her pumped out.

Q. Were you doing the pumping ?

A. Yes, sir.

Q. Do you enjoy pumping ? Is it good fun or hard work ?

A. It is hard work. There was not water enough in her to make it hard work.

Q. Was she leaking any in coming from Fort Washington to Georgetown ?

A. No, sir.

470 Q. When did she begin to leak ?

A. Sunday morning or Saturday night ; I don't know.

Q. When did you first see she was leaking ?

A. Sunday morning.

Q. Was that the same day she sunk ?

A. Yes, sir.

Q. Were you aboard of her while she was lying at Georgetown ?

A. Yes, sir.

Q. Was she pumped out regularly while there ?

A. Yes, sir.

Q. Before Sunday, while she was lying there, did you pump her out regularly ?

A. Yes, sir.

Q. How many strokes did you get out of her ?

A. Not more than fifty strokes.

Q. You remember a flaw striking her in the Potomac while she was in the river ?

A. Yes, sir; I remember that; I remember the squall.

Q. You remember the squall striking her?

A. Yes, sir.

Q. What damage did that do?

A. It didn't do very much damage.

Q. Did it injure the hull at all?

A. The hull? No.

Q. Did it hurt the body of the vessel at all?

A. No.

Q. What did it hurt?

A. It split the spanker boom, and that is all, and parted the bow chain.

471 Q. Did you hear the foreman of the wharf say anything to the captain about breasting the vessel off?

A. Yes, sir.

Q. What was it?

A. They were talking about putting a scow inside, so they could breast her farther out.

Q. Did he say anything about a pole?

A. Yes, sir; he was talking about a pole, too.

Q. Was there a pole there?

A. There was one pole there.

Q. Was she breasted out with that pole?

A. Yes, sir.

Q. And he talked about getting another pole?

A. Yes, sir.

Q. Do you remember when that was?

A. I don't know when it was; I know I heard it.

Cross-examination.

By Mr. BARNARD:

Q. You don't know whether that was on Sunday or Monday?

A. No, sir.

Q. That was after the vessel sank?

A. It was before.

Q. Before the vessel sank?

A. Yes, sir.

Q. Did you notice her leaking on Saturday night?

A. No, sir; she didn't leak any then.

472 Q. She didn't leak any then?

A. No, sir.

Q. Did you sleep on board that night?

A. Yes, sir.

Q. When did you discover she was leaking?

A. Sunday morning.

Q. What time?

A. A little while after breakfast—about 8 o'clock or half past seven.

Q. Where were you when you heard this conversation about breasting the vessel off with another pole?



A. I was aboard the vessel.

Q. Who was with you?

A. Only the crew, me and him (Andrew Stevens, the former witness)—some of the crew—and the cook, besides the captain and the mate.

Q. Who was the foreman of the wharf?

A. I don't know who he was; I know the man. I knew him when I saw him down there. He was the foreman.

Q. Who spoke about breasting her off, the captain or the foreman?

A. He spoke about it.

Q. The foreman?

A. Yes, sir.

Q. What did the captain say?

A. The captain said he was going to do that Monday.

Q. Now, when was this?

A. It was some time before Sunday—Friday or Saturday; I don't know which.

473 Q. Friday, Saturday, or Sunday?

It was not Sunday.

Q. Was it Monday?

A. No, sir; it was either Friday or Saturday.

Q. It was either Friday or Saturday you heard this?

A. Yes, sir.

Q. Where was the foreman standing when he said it?

A. He was standing on the dock at knocking-off time.

Q. Where was the captain standing?

A. He was aboard the vessel.

Q. Was the machinery going for loading at that time?

A. It was just after knocking off.

Q. After knocking off?

A. Yes, sir.

Q. Did the foreman halloo pretty loud, so the captain could hear him?

A. Yes, sir; he could hear him.

Q. You could hear him pretty plainly?

A. Yes, sir.

Q. What did the captain say to it?

A. He said, All right.

Q. He said, All right?

A. Yes, sir.

Q. What were your duties on the boat?

A. I was a sailor.

Q. Did you make any soundings?

A. No.

474 Q. Did Andy Stevens?

A. He was down the hold. He done no soundings Sunday morning, when she started to leak.

Redirect examination.

By Mr. HAGNER :

Q. Did you say they did no soundings before Sunday ?

A. No, sir. Andy went down the hold, because she was leaking, to see what was the matter.

Q. How many days were you in Georgetown ; do you remember ?

A. About a week, I guess, or so, as near as I could tell to a day or two.

It is stipulated by counsel that the commissioner sign this deposition for the witness.

RUTLEDGE WILLSON,  
*Sp'l Comm'r,*

For MARTIN THOMPSON.

May 10, '94.

Whereupon an adjournment was taken, to meet at 3 o'clock on Wednesday, May 23, 1894, at the same place.

WEDNESDAY, *June 27, 1894.*

Met pursuant to adjournments from time to time by consent of counsel since May 23rd, 1894.

Present: Randall Hagner, Esq., on behalf of libellants,  
475 and Job Barnard, Esq., sol'r for the respondents, and Mr.  
Wm. G. Endicott, of libellants.

Whereupon ANDREW J. COLE, a witness produced on behalf of libellants, being first duly sworn, testified as follows :

By Mr. HAGNER :

Q. What is your occupation, Captain ?

A. Seafaring, going to sea.

Q. Where were you in December, 1892 ?

A. December, 1892, I was in Georgetown—West Washington.

Q. Were you there during Christmas week ?

A. Yes, sir.

Q. What vessel did you have in charge then ?

A. The Francis R. Baird.

Q. What was her draught, Captain ?

A. When fully loaded, fourteen feet.

Q. What was her register ?

A. Three hundred and twenty-five and sixty-seven one-hundredth-tons.

Q. What would she carry ?

A. Five hundred tons—that is, about.

Q. How many masts on her ?

A. Two.

Q. She was a two-masted schooner ?

A. Yes, sir.

Q. Where were you in Georgetown ?

A. At Mr. Smith's elevator, taking in crushed stone.

476 Q. What were you taking the crushed stone from; from what part of the elevator?

A. From the chute; the long chute. I don't know just where it is located; somewhere in front of the building.

Q. Just state what happened there while you were loading, Captain.

A. Well, after we had been there two days loading the boat—we waited considerable time for the broken stone; they were hauling it to the city—and we had been there two or three days loading, and her bilge seemed to catch in what they call the bank after we had been there a few days.

Q. What did you do about that?

A. I was talking with the foreman about it—the man who was loading—and he said it was a bank, and they had to keep her sparred off as they loaded down, had to keep from it, and I ought, he said, to look out for my vessel; and I says, That sounds new to me. I says, I am not the man to know where your obstructions are—an entire stranger, and he said the other captain looked out for his vessel; and I said, You invited me in here, and he said the other attended to his vessel, and I said I would do the same if you tell me where to put her, so he furnished me a spar and we sparred her off.

Q. Did you see either of the Messrs. Smith about that?

A. In the afternoon, I think it was, I went to Captain Lee's and I saw the old gentleman.

Q. The older Mr. Smith—the father?

A. Yes, sir; and we talked there considerably, and I said I did not think much of his berth and I was afraid of it, and he assured me there was nothing there to hurt a vessel at all; that he had a dock there fourteen feet deep and nothing could hurt it.

477 Q. And then what happened?

A. We went on loading by times; other times we were idle, you know.

Q. Then what happened?

A. And one morning before there was any work going on I went up the street to Mr. Baerd's store to get some underclothing and white shirts. That is all I know. It was on the street where the cars run.

Q. Where the cable cars run?

A. Yes, sir; the electric cars and cable run; and when I came down, somewhere near eleven o'clock, she was aground. I noticed she had sued out of water about eight inches. You could see the mark on her, and I asked the foreman what he was doing by letting the vessel aground, and that I supposed you were going to keel her up. He said it was flood tide and we would shove her off before she gets aground, but I said, She is already aground, and he says, No, no; that could not be, and I says, Here is the water over here on this side, showing the streak where it had been and where it dropped from, and he said that was caused by the chute landing the stone over in the further bilge. I says, It is no such thing; it

is aground, and you come and see. He didn't hardly believe it, and I took the pole and sounded it.

Q. What sort of a pole did you sound with?

A. A setting pole.

Q. How long was it?

A. Eighteen or twenty feet long.

Q. You sounded?

A. Yes, sir.

Q. What then?

A. I said that didn't sound to me like a bank of mud. What does it sound like? He said, That is rocks dropped off the  
478 scows, or something of that kind?

Q. You asked him, What does that sound like?

A. Yes, sir.

Q. And he said it sounded like rock?

A. Yes, sir; it was hard.

Q. What did you do then?

A. I asked him where Mr. Smith was, and I don't know whether he said he did or did not know. I said you had better hunt Mr. Smith up right off, because he owns the vessel now, and he hustled right off for Mr. Smith—I suppose the old gentleman, but this gentleman here came (indicating Chas. G. Smith, Jr.).

Q. Young Mr. Smith?

A. Yes, sir.

Q. What did he say?

A. He came down and inquired what the trouble was, and what was to be done, and I told him there was considerable trouble; that we were strung on the rocks, and he said that could not be, but I said, I think I know rocks, or something like that, to him, when I strike rocks, and I sounded to satisfy him.

Q. What did you sound with?

A. With the pole.

Q. With the same pole or not?

A. I don't know whether I had the lashed one or not.

Q. You lashed the two poles together?

A. Yes, sir.

Q. How long were the two poles you lashed together?

A. Anywheres from fourteen to sixteen feet.

Q. And you lashed them together?

479 A. Yes, sir; lapping about three feet, so I could get on the scow and reach towards the keel and see what she was on.

Q. Go ahead.

A. I think Mr. Smith was satisfied there was something there hard. He acknowledged it sounded like rock by the pole fetching up solid. Of course, I was not satisfied with that, and reached from the scow under, and still there was rock down to the keel. It didn't sound like shell rock, like he represented. The pole had forty-five degrees angle and sloped in under the boat. Somewhere the rock was higher than others, comparatively so, and the pole would slip more or less as I bore on it—as I shoved it to the garboard.

Q. What is the garboard?

A. It is the next streak of plank to the keel.

Q. What is the name the sailors call it?

A. Garboard.

Q. Don't the sailors call it "garbage"?

A. No; I don't know that they do. That would be rather a dirty name.

Q. That is the next streak beside the keel, is it?

A. Yes, sir.

Q. That is the streak of plank that goes along by the keel?

A. The garboard streak is caught between the planking and keel.

Q. Now, just describe that. You say you had two poles lashed together and in Mr. Smith's presence that you sounded there, and you said, What does that sound like?

A. Yes, sir.

Q. What did he say to that?

A. He admitted there was something like rocks. I don't know what he said.

480 Q. Did he state it sounded like rocks?

A. He said there was no ledges in there, nothing to hurt a boat, nothing more than would fall off the lighters, or something like that, but he didn't think there was anything there to hurt a vessel. I didn't feel altogether satisfied as I felt underneath.

Q. When you asked him what it sounded like what did he say?

A. He acknowledged it sounded as though I struck rocks. I said, Ain't there rocks there? and he admitted there was.

Q. What happened then?

A. The tide kept dropping from her and the wind was blowing heavy from westward—the tide kept dropping, and when they thought they should have flood tide it didn't come in any, but it kept dropping, and the expressions of a great many around there about the wharf and about all hands said they never saw the waters flow out so low out of the river. That is what they seemed to say.

Q. What did Mr. Smith do when you told him this?

A. He was there on the wharf, and Mr. Smith wanted a few moments for a talk to understand about what we were on. He said, What is best to do? and I says, I don't know that I have anything to propose about it; it is for you to do what is best; we are here in a fix, and the thing to do is to get out of it, and he says, Suppose I send a tug to pull on you, and I said, I don't think it can pull us *opp*, but he ordered the tug to pull on us, and the tug went to the port bow, and I think—

Q. He put the tug to the port bow?

A. Yes, sir.

Q. How were you lying then?

A. We were lying with our bow up the river.

481 Q. Bow up river?

A. Yes, sir. I don't know whether it was our hawser we gave him or theirs. I know, as I told you, I was sounding, as I

wanted to find out how she lay, and they pulled on her and pulled her bow off shore a little and her stern fetched up on the ground inside. As the bow went off her stern would go on, and Mr. Smith proposed, as they could not pull her off that way, that the tug haul on the stern and try that way. I think I told him it was no use, that them tugs could do nothing with her, and he said, There is no harm in trying; and he ordered the tugs to haul on the stern and they pulled the stern away the same way until her bow turned.

Q. What did you say to that?

A. I don't know as I said anything.

Q. What conclusion did you come to?

A. I was feeling rather bad about the position the vessel was in. Then Mr. Smith sent a man after another boat, and two boats took hold of the bow again and they pulled on her, and I think they parted some of their line and got disgusted with it, as they thought they could not do anything that day, and gave it up. Then the tide kept falling all that day when they said it should be flood until somewhere in the evening she was out of the water about three feet by mark as far as I could see—three feet out of the water.

Q. Well, did you do any more sounding then?

A. Yes; I sounded more or less; it was real cold, but I sounded more or less forward and aft under her, and all I could. The more the tide got down the better I could see how she lay.

Q. What was the result of that sounding—what conclusion did you come to?

482 A. All I could make out was that between her mainmast and main hatch she was bulged up; her decks bulged up. I could get the location from that where the obstruction was by the way her decks were bulged up.

Q. That was about her middle?

A. Very nigh her middle; that is all I could find. I could find mud in other places.

Q. I think you said—I am not sure, though, but I think you said she had been put in position by the foreman, Mr. Speaker, to reach the chute?

A. Certainly he let her on. He slacked her tackle on a spar and let her come on, I guess, but I thought it was all right, it would be flood-tide, to load her on the flood-tide, but she got aground on me.

Q. Tell about the fact of her being on this rock—what happened.

A. She lay there. Of course, we watched her and tried the pumps, but we did not seem to get much water out of her, because she leaned off. So we lit the lanterns and went down into the hold to see if there was water getting into her, and to see what damage had been done there. I heard something that sounded to me as if something had given away in the hold, and I found down there that the stanchions had broken a couple of her beams.

Q. Her deck beams?

A. Her deck beams; but we didn't see much water.

Q. Did you mention to Mr. Smith that the deck beams were broken?

A. I showed him it was shoving her decks up and asked him to

483 come on deck and look with me. He came down below with me and looked at those beams and he seemed to think they were not very good beams, and I agreed with him they were not the best, but they answered the purpose as long as they were whole.

Q. They were pretty good deck beams as long as they were whole?

A. Yes, sir.

Q. What did you and Mr. Smith do then?

A. I don't know what he done right off, as my memory don't serve me, but soon after this in talking the matter over he wanted to know what I knew the real damage was to my vessel. I said I thought that was rather hard to determine. I don't know I said what it would cost to repair her, and I said, You might do the repairs with not very much cost, but I would not like to have my vessel lying in such a position for a thousand dollars; neither would I, for it strained and started her fastenings. When the vessel starts her fastenings that way you cannot get them to hold again. He injured my vessel and I never could keep her.

Q. Was there any ice there she could have gotten on?

A. There was no ice at that time.

Q. There was no ice at that time?

A. No, sir.

Q. What was the character of the water for several days while you were lying there and before she went on this rock?

A. It was more or less rainy; disagreeable weather.

Q. Then it got cold latterly?

A. Yes, sir.

Q. Was there any ice formed when she got on there?

A. No.

484 Q. No ice then?

A. No; no ice then; it was blowing very cold and growing cold.

Q. That blowing cold is subsequent to her getting on the rock?

A. That was afterwards. Well, it was blowing in the morning from the westward the morning he let her on, to let her up the chute; blowing heavy down the river.

Q. But there had been no ice formed up to that time?

A. No.

Q. Could she have been struck on any ice?

A. No.

Q. Does ice sink?

A. No.

Q. Ice floats?

A. Yes, sir; there was ice made that next night as soon as the wind went down.

Q. That was afterwards?

A. That was afterwards.

Q. Did the freeze last after the wind went down?

A. Yes, sir.

Q. Well, did Mr. Smith make any arrangements by which tugs



should come over from Washington? What arrangement did he make about that?

A. That was later on. Mr. Smith and I talked this over about the damage done, and he wanted to know what would satisfy me and I would sign the bill of lading and everything would be right.

Q. So the bill of lading could be signed and you could go down to Fort Monroe?

A. Yes, sir.

485 Q. Where were you to take the stone?

A. To Fort Monroe.

Q. What were you to receive for taking it there?

A. Fifty cents a ton, and he to load and discharge it.

Q. They to load it and discharge it?

A. Yes, sir.

Q. They loaded it and were to discharge it?

A. The parties at Fortress Monroe were to discharge it.

Q. You were not to do it?

A. No.

Q. Now, go on and tell me what you finally concluded.

A. Mr. Smith and I talked it over and he asked me what would satisfy me, what would do. I says, I will make you a liberal offer, as I want to get out of this hole and didn't want to spend the winter here. I will make you a very liberal offer, as I owned most of the vessel. I will charter it if you will put me down the Potomac below the ice. I will sign the bill of lading.

Q. And settle it?

A. And consider it settled.

Q. In other words, your proposition was that he was to pay the expense of getting you down below where there was any ice formed—

A. I don't know whether he paid for it, but as long as he agreed to put me there I was satisfied if I saved my vessel.

Q. Now tell us what happened.

A. Then the ice strengthened fast and Mr. Smith told me his tugs would me of no use; his tugs would not be able to take us down through the ice, and the schooner Annie B. Mitchell wanted to be towed down, and he make arrangements with the Annie B. Mitchell so that I could go at the same time.

486 Q. That is what Mr. Smith told you?

A. Yes, sir. This boat had a plough and another boat to assist in towing us and I went on after. The ice strengthened; the ice got so thick—I don't know whether this was two or three days; I didn't know how fast the time went, but the ice thickened all the time, and I went down with my hatchet and cut around the vessel about six inches from the vessel so I could sheave her with boards—with hard-pine boards.

Q. What was that for?

A. To prevent the ice from cutting her when towing down through the ice. I was most through, I think, when the tugs came up after the Annie B. Mitchell. She loaded before—and they came up and hauled me and said did I want to tow down, and I said, All right

and willingly, and the tugboat—I don't know; I think I kept right on working—they landed above my bow and went into the office.

Q. What office?

A. Mr. Smith's office, where I found them. I was sent for at Mr. Smith's office and I got up there, and I don't know how the thing was broached, but the tugboat men wanted to know what I was willing to pay. I said Mr. Smith was going to put me down below the ice by his agreement. Well, Mr. Smith says, That was when I calculated on getting you out with my boats, but as we sent down for these I think that alters it, but he will do the fair thing with me, or something like that. He offered to pay \$25 off that. I said, I don't think so; I think an agreement is an agreement, and I think a man ought to stand by his agreement whether it costs him or not; and

Mr. Smith didn't feel disposed to pay the whole towage of  
487 this boat, as his boats could not tow me, and I had an idea of not going.

Q. Was your vessel insured?

A. I had a thousand on it and I said I would not go. I felt indignation over such a proceeding as that and I had a mind to stay and protect it and commence suit for damages to my vessel, because I did not think I was used properly, but the captain of the tug began to move away and I began to reflect that if I stayed there after the offer from them to tug me out and the possibilities of getting the boat—I could not get away for the season, as that was the last time the boat was expected to get up, unless there was a big thaw and unless I injured the cargo—and I took the reasoning that if any harm should come to the cargo I would become responsible, so I hailed the tug and he took us on down to Alexandria.

Q. Then what happened?

A. They provided a wharf—the tugs did—at Alexandria.

Q. How long did you stay there?

A. I think we lay there about five days.

Q. Then what did you do?

A. The tugs put me down below the ice.

Q. What about the bill?

A. I sent the bill so that he would get his money from Joe Lee, the ship chandler—Captain Lee.

Q. That was the arrangement, was it?

A. Yes, sir; and he left.

Q. And the way the thing was finally settled?

A. Yes, sir.

488 Q. So you paid \$35 and Mr. Smith \$25?

A. Yes, sir.

Q. Captain, you have seen a centerboard in your time, have you not?

A. Yes, sir.

Q. I will take this little model here, which is called "Libellants' Exhibit Berry No. 1," and I just want to ask you—

The WITNESS: I don't know. I might have paid the tug my part. I could not say for certain. I had to settle my part. I might have had the money with me and paid it.

Q. At all events, that is the way the thing was arranged. That was finally arranged that you pay \$35 out of the \$60?

A. I arranged to pay it or paid it. He took it out of the freight if I did not take it out and plank it down.

Q. The freight came to you from Lee?

A. Yes, sir; I had to send the bill of lading, after the quartermaster signed it, up to Lee.

Q. Now, Captain, look at this model marked Libellants' Exhibit Berry No. 1, and look at this little box that is shown you—this little wooden concern—and state whether or not that is a representation of the centerboard of a schooner of that size.

A. That represents it very well.

Q. It is a fair representation?

A. Yes, sir; that is the plan they go on.

Q. Now, the testimony in this case is to the fact that the centerboard well was 36 feet long. The centerboard is only a few inches from flush with that when the king-pin is in. It is only a  
489      few inches from the far edge of the centerboard well. Now a centerboard that was in the neighborhood of 36 feet long—say 35 feet long upon its being let down into the water—would go into the water to the lowest depth of, say, how much?

A. About twenty feet. You say this well is how long?

Q. Thirty-six feet long.

A. Well, probably, then, the board is thirty-four, and that ought to drop—I don't think that ought to drop it down more than twenty feet.

Q. In other words, there is twenty feet of hold in the water which that centerboard would give, and the vessel would get that advantage over a keel boat—one that didn't have a centerboard?

A. We get the advantage very much in this way, in tacking ships, and then again on a long tack this board holds to windward. In working on the wind it is a great advantage.

Q. Suppose you are working up the river and you come to a shoal and have a centerboard, what is the worst that can happen?

A. The centerboard strikes the bottom, and that warns you to pull it up and go on a new tack. If you have a cross-tide, which is driving you to leeward, it is liable to break the centerboard, so you must pull the centerboard up.

Q. Is it of advantage in working in a river to have a centerboard?

A. Yes, sir; it would never have been invented otherwise, because it is expensive and more or less troublesome besides.

MR. HAGNER: I want to put in evidence this model of a centerboard, to be marked Libellants' Exhibit Cole No. 1, which is filed and so marked.

490      Cross-examination.

By Mr. BARNARD:

Q. Captain Cole, how did you ever get your vessel away from Mr. Smith's wharf in Georgetown?

A. Well, when the tide came in—after the wind let up and the tide came in—she floated, and we pushed her off some way and held her off and crowded in lighters inside of her and held her off from the stone and rocks.

Q. The difficulty was, then, with the low tide, wasn't it?

A. Certainly; we were aground.

Q. And you say that was an extraordinarily low tide?

A. They said it blowed out very heavy that day.

Q. How long did it continue low water?

A. It didn't make any flood in the part of the day it should. It still kept on falling, and so it got very low, so she was out of the water about three feet.

Q. When the tide came back again you had water enough to float?

A. Just as soon as the wind went down and in the natural course of events gave the water a chance to come in. I think it was the next day—some time in the day—but it might not have been until the day following.

Q. Now, in the meantime, ice formed around the vessel, didn't it?

A. After that evening—she grounded about eleven, somewhere—near eleven. That evening the ice began to make, in the evening when the wind went down.

Q. When the tugs fastened onto her to haul her didn't they have to break the ice first?

491 A. Yes, sir; they had a tug around to break the ice, as it was as much as an inch and a half thick.

Q. So she was in the ice at that time?

A. Certainly; I said I was in the ice and sheathed her. That was the second or third day after she grounded the tug came after her, I should think it was. We waited for them. Mr. Smith kept telling me they were coming.

Q. At that time she was afloat?

A. Yes, sir; square off of this obstruction. Of course I didn't wait for her to get aground again.

Q. And the tugs hitched onto her and hauled her below the ice?

A. Yes, sir; and got her down to Alexandria.

Q. When was the vessel built?

A. When was my vessel built? At that time being there she was twenty-nine years old.

Q. When your vessel was hauled in there for loading this stone where did she lie with reference to the wharf of Mr. Smith?

A. She lay right abreast of the building, so that we could use the hatch—either the aft-hatch or the forehatch, whichever they wanted.

Q. Did she occupy any other position than the one first assigned her when she first went in?

A. Yes, sir; we moved backwards and forwards. When we first went in there, there was one lighter inside of us, and later on, in loading, there were two breasted up inside of her.

Q. So that her position was changed up and down the river as well as in and out from the wharf?

A. Yes, sir.

Q. How did you load the stone when the two scows were in there?

492 A. When the two scows were in there they wheeled some in some place, and in the morning one lapped on the other in by her stern, and when the foreman let her in there was one inside of her by her bow. He ought not to let her in; he ought not to slack up the spar and let her in. He ought to have kept her off.

Q. So she grounded inside?

A. When I docked her in Norfolk she had taken an eight-inch shoe off—jambed it all off and tore it away 20 to 30 feet on one part. One was four inches and the other was four inches on top of the other. Some part of it was from eight to ten feet to twenty-five feet torn off on her keel, and her keel was all broomed up like a basket where she bore heavy a-port and bore over four and six feet along in a place. I had the keel sawed into and chiseled out and four-inch thick and 18-inch wide pieces put in.

Q. Who did you make this contract with for carrying this stone?

A. Who engaged me?

Q. Yes.

A. Mr. Lee—Captain Lee.

Q. And what was the bargain?

A. I was to carry it to Fortress Monroe for fifty cents a ton, they to load and trim her and discharge her there and to load me as quick as they could.

Q. How much of a crew did you have?

A. There were four of us.

Q. You have been in the business a long time?

A. The stone business?

493 Q. I am not talking about the stone business; I am talking about the business of running the schooner.

A. Thirty-eight years next August coming.

Q. When you hire your vessel to carry a load of stone or other cargo for so much money, don't you take care of your own vessel and the manner of looking after her?

A. Certainly I do, so far as my part is concerned. I ain't supposed to know about a man's dock. I am a stranger and he must warn me. If I charter my vessel to this man and she is incapable of doing work, I am under an obligation to him for damages or for damages by it, but if I am damaged by his dock he is responsible to me.

Q. Was this vessel chartered?

A. Yes, sir; not with a charter-party. I took his order.

Q. What is the difference between chartering a vessel and in your agreeing to carry freight for so much a ton?

A. It is all about the same thing, so far as the berth is concerned.

Q. Suppose you chartered her to Mr. Smith, then what would have been your duty as master and what would have been the duty of the crew?

A. Just the same as in this case exactly; no difference.

Q. Wouldn't you have to obey Mr. Smith then?

A. I would any time. I would obey Mr. Smith any time and did do it.

Q. What right did Mr. Smith have to give orders to you or your boat when you agreed to haul freight for so much, and didn't you have to handle it in your own time?

A. Certainly. How do you mean?

A. Directions about the managing of the boat?

A. His foreman was there. They have to move the vessel about to load it to suit their convenience. I am subject to them.  
494 I am ready to haul my vessel where they order it. If I say, I cannot haul my vessel, they say, I cannot load you.

Q. What do you mean by a dock?

A. Any wharf or place for loading or discharging.

Q. Whether out in a river or in a slip?

A. I don't care where it is placed. It is their place to load and discharge. They are in the habit of taking cargoes in and out, and they ought to take the burden of loading and discharging, and they ought to know how their wharf is just as well as I know what my vessel is.

Q. Had you ever been at this wharf before with your vessel?

A. No, sir; not with the vessel. I had been above it many times, loading soft coal at the coal docks.

Q. You were never at this wharf before?

A. Not as I know of. I might have tied up to this wharf in my day, but I have no recollection of it distinctly.

Q. Do you know what was at the bottom of the river at this point that your boat struck on?

A. I don't know, but from what I suppose by the fetching of my pole she was on rocks; that is all I know, and I located it where she was bearing; that is all I know about it. They protested there was no rocks there.

Q. I thought you said they admitted there might have been some rocks fallen off the scows?

A. I mean solid rocks liable to hurt a vessel. They said they might be some small rocks there.

Q. You said the surface of this substance was uneven?

495 A. Rather uneven. As I moved my pole along it would be six inches over the water, or six inches under, or maybe less. It was comparatively smooth so that the pole would move, and I asked how that was. I could not believe it was on any such a thing as small rocks, because it shoved her three feet out of the water, and she turned on a pivot, and this rock held her up three feet out of the water, and it did not look reasonable to me. I was in the business too long. They still said it was the cause that some stones got off the lighter and were deposited in this dust coming down to this long chute. I kind of gave up to this idea that it might be something of that kind, but it looked something strange to me.

Q. When did Mr. Smith, Sr., say they had dredged or excavated there in front of the wharf?



A. After I had been there a few days loading, when I met him in Captain Lee's office.

Q. When did he say the work had been done?

A. I had an impression he said three or four years before he had had it done; I won't be certain. I did not pay any attention to the date of it, but it had been dug out and I had the impression it had been dug three or four years.

Q. How deep was the water at the time your vessel got around there?

A. When we touched bottom we were drawing twelve feet strong, that means nothing less, by the cargo we had in.

Q. And at this extremely low tide, how much water did you have?

A. We had about nine feet on the rock, in the place she was on about nine feet; on the inside of her we had twelve. I suppose there was twelve feet inside of her bilge, somewheres near there.

496 Q. How far from the edge of Mr. Smith's wharf was this rock or other substance your boat was fast on?

A. Judging by the width of my vessel—she was thirty-five feet wide and over—I should judge she was anywheres from 25 to 28 feet from the wharf, and it might be more than that; it might be from 26 to 29, somewheres along there.

Q. Were there two lighters in then between her and the wharf?

A. No; I don't think there was then. I got down on one lighter abreast of the main rigging and shoved the pole under it to feel the bottom.

Q. How far was your vessel from the edge of the lighter or scow?

A. Well, about six or eight feet, I should think. It gave me a good chance—it gave me a slant to shove my pole under the vessel. If it had been close up I would have to make it plumb.

Q. At the time she grounded who was on board?

A. My three boys I had with me—men. We always call them boys we have aboard.

Q. But they didn't discover she was aground, as I understand?

A. They didn't pay attention to it. I had no mate and had no officers. I attended to the whole thing, and when I got there I found she was aground.

Q. Is that the usual way of managing a boat of that kind, without a mate?

A. Sometimes you have a mate and sometimes you have not.

Q. If you had been on board of that vessel you would have known when she went aground?

A. No, sir; I don't know as I would. It was all his business to load her and he takes the risk, for she is his then.

497 Q. I want to know if you had been on board that vessel would you have known when she went aground?

A. I might and might not have. If I happened to be on deck and seen the water going away from it as it did, I might have noticed it, and if I was below while we were loading her, I would not know.

Q. Would you expect the foreman of the wharf to know when your vessel would go aground how to manage it?



A. He ought to. He loaded a lot of vessels there and had to keep them off. He was just the man to know.

Q. He knew the capacity of your vessel for holding freight?

A. Certainly; he had some judgment. He knew where the chute was and how wide the dock and how many scows to put inside and how many poles to keep her off.

Q. You don't think you were to blame about that?

A. How could I be any more to blame than you are?

Q. Are you in the habit of putting vessels in there without sounding?

A. In making out charter-parties, they say proceed to so and so's dock; there is sufficient water and a safe berth to load in; and it is the same when you go without it.

Q. You had no charter-party?

A. No, sir; it means the very same thing when you go without it.

Q. You were ordered to load the freight at so much a ton and you were to get it?

A. Yes, sir; that was it. Their wharf was the place I was to get it. I didn't provide any wharves or make them.

Q. Do you know how much water they had there opposite this wharf?

A. Well, I don't think they had enough to float me after  
498 we were loaded. We were drawing about twelve and a half feet, and had no trouble afterwards; that is all I know about it, further than what I had with my bill.

Q. Before you went in there did you know how much water there was there?

A. They told me fourteen feet.

Q. Who told you that?

A. Mr. Lee and Mr. Smith and the captain of the "Williams" that loaded ahead of me. He said there was fourteen feet of water there at high tide.

Q. At any rate, you found enough to float you, drawing twelve and a half feet?

A. Yes, sir; I don't know whether there was on the rock or not.

Q. You floated on the rock?

A. Yes, sir; I mean the loading of the vessel. I don't know how much there would be on.

Q. Did you float off the rock before you loaded your vessel or was she already loaded when she stuck fast?

A. We put a little bit into her and trimmed her.

Q. How much did you put in, about?

A. That I don't know; not much, and trimmed her. She had not been trimmed amidships. Mr. Smith seemed disposed to get the vessel loaded. He had to trim it for me; that was all right and proper.

Q. Who told you about there being fourteen feet of water, do you know?

A. I don't know who; several. I got it from plenty that  
499 there was fourteen feet of water, and Mr. Smith told me he had had it dug out previous to this to fourteen feet of water

Q. How much did your boat carry?

A. Five hundred tons, well loaded.

Q. What was your permit to carry? Did you have to have a permit or license or register?

A. We were under a coasting license, but that didn't say how much we could carry. The master of the vessel is to load a vessel. If he has not judgment enough to load a vessel, he hasn't enough judgment to be there.

Q. Didn't you have to report tonnage to the inspector?

A. Yes, sir.

Q. And how much tonnage you took on?

A. We didn't have to report anything of that kind. We have to give our net registry in tons.

Q. What was it?

A. Three hundred and seventy-five sixty-seven hundredths tons.

Q. What was the gross tonnage?

A. That was five per cent. of the gross. When the reduction was made in Congress the net tonnage was five per cent. off the gross.

Q. Do you remember the amount of the gross tonnage?

A. 342.08 tons. That was it—five per cent. off.

Q. Then what makes you say you could carry five hundred tons on her?

A. Because a vessel of that size will carry five hundred tons of weight.

Q. How much stone did you have on?

500

EXHIBIT A. J. COLE No. 2.

*Marks.*

Vessel to unload in turn at rate of 50 yds. p'r day or more and to receive demurrage at rate of 7 cts. p'r ton p'r day on registered tonnage of vessel if detained longer; no demurrage to be allowed if vessel cannot lay at wharf.

Shipped in good order and condition by Chas. G. Smith & Son on board the schooner called the F. R. Biard, whereof A. J. Cole — master for the present voyage, now lying in the port of West Washington, D. C., and bound for Ft. Monroe, Va.—to say, 400 tons, more or less, of broken stone, being marked and numbered as in the margin, to be delivered in like good order and condition at the aforesaid port of Ft. Monroe, Va. (the danger of the seas only excepted), unto U. S. Engineer dep't or assigns, he or they paying freight for the said goods at the rate of fifty cts. p'r ton of 2,240 lbs., & discharged by consignee with — per cent. primage and average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to three bill-of lading, all of this tenor and date, one of which being accomplished the others stand void.

Dated West Washington, D. C., Dec. 27th, 1892.

A. J. COLE.

(Endorsed.)

12, 27, '92.

Rec'd 35.00, to be deducted for tow bill.

FORT MONROE, VA., Jan'y 13th, 1893.

Received from Chas. G. Smith and Son, Washington, D. C., per schooner F. R. Baird, three hundred and fifteen  $\frac{61}{100}$  cu. yds. of broken stone.

GEO. A. GIVEN,  
1st Lieut., Corps of Eng'rs, U. S. A.

352 tons.  
.50

\$176 00 freight.  
25 00 tow bill.

E. B. \$201 00

Received payment.  
Jan. 16, '93.

JOSEPH H. LEE.

501 A. I think my bills of lading called for 350 tons.  
Q. 352 tons you had on?

A. Yes, sir.

Q. Is that the bill of lading (handing witness a paper)?

A. Yes, sir; I think that is it; that is my signature.

Mr. BARNARD: I offer this paper in evidence, to be marked Libel-lants' Exhibit Cole No. 2.

Redirect examination.

By Mr. HAGNER:

Q. Captain, I want to ask you to locate that rock. You located it in distance from the wharf. I want you to locate what its position to the elevator was.

A. Well, I should say it would go about six feet from the eastern corner of the elevator, and following a line striking at right angles and going out you would strike where my vessel lay aground.

Q. Now, can you locate it in respect to the alley alongside of Mr. Smith's office?

A. I could locate it; that alley, in my judgment, I should say it might be fifteen feet to the westward of the alleyway.

Q. To the west or east line?

A. To the west line of the alleyway.

Q. Adjoining Mr. Smith's?

502 A. Yes, sir; where you go up around the corner. I didn't take a great deal of notice of that.

Q. You say that after the vessel strung on the rock the second time and she was left there by the tide, when did you get off?

A. I rather think she floated the next day ; somewheres along in the afternoon. It might be the second day. I could not say.

Q. When did she float ; what did you do with her ?

A. We pushed her off.

Q. How far ?

A. So as to clear this rock—the length of the spar—so there was no danger of touching again.

Q. You sounded there and found there was plenty of water so that you would not touch again ?

A. Yes, sir ; when she was sparred off.

Q. When the tug from Washington came, Captain, did it or not have to pull you off the rock ?

A. Oh, no.

Q. They didn't have to pull you off the rock ?

A. Where it was laying there was no rock there. I had been afloat some time, and was all around her and sheathed her. They didn't have to do any pulling there. They had to break the ice. They sent a little ferry-boat around up to the bridge and down to the wharf below me. She had to enter the ferry channel, but that would not do for me at all. They circled around cutting up the ice to make a channel.

Q. And they pulled you out ?

A. And they pulled me out.

Q. So they didn't have to pull you off the rock at all ?

503 A. Not at all ; they were to pull me down the river.

Q. This bill of lading, Captain, this receipt of lieutenant of engineers ; that is for 315.61 yards of broken stone ?

A. Yes, sir.

Q. How much would that weigh ?

A. I don't know much about that, but the way Mr. Lee told me how the stone went we figured at about that many tons—three hundred and fifty.

Q. That is 315 yards ?

A. Yes, sir.

Q. Three hundred and fifty-two tons is what you carried down and got paid for ?

A. Yes, sir ; and got paid for.

Q. As I understand you—I want to know whether I am right or not—that it was with a spliced pole—that is, with the two poles put together—that you, in the presence of Mr. Smith, sounded when he said there was not any stone there, and that you then sounded and said, What does that sound like ? And he said, That sounds like rock. Is that right ?

A. I told Mr. Smith—I said I think I know rock when I strike it, and he said it might be some small rocks that fell off the lighter, or something of that kind.

Q. He admitted the idea that there was something hard there ?

A. She was aground there and would not float off.

Q. What was the cause of the deck rising up ?

A. The middle, between the hatch and the mainmast, was raised up from bearing on this rock.

Q. Her center?

A. Yes, sir; on her keel.

Q. She was bearing on the keel?

504 A. Yes, sir; she was bearing on the keel on the rock. The stanchions were endwise on the keel, and also against the beams, and then right bearing on them were the stanchions of the upper deck where the beams of the deck have to go.

Q. It was not the stone inside of the vessel that was shoved up against the deck of the vessel and shoved her deck up?

A. No, sir; the stone didn't shove any. It helped to shove the deck up because it helped to press the vessel on the rock.

Q. In other words, the weight of the stone on the rock was what caused the rock to push up the keel; but there was plenty of space between the crushed stone and the deck of the vessel, and there was no pressure of the crushed stone against the deck of the vessel?

A. No; it didn't touch her decks.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

It is stipulated that the examiner sign this deposition for the witness.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

And the taking of the depositions was here adjourned to June 28, 1894, at 12 m.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

505 JUNE 28TH, 1894—1.30 p. m.

Met, pursuant to adjournment last noted, at 1.30 p. m., instead of 12 m.

Present: Randall Hagner, Esq., proctor for libellants, and Job Barnard, Esq., proctor for respondents.

GEORGE A. NOWLAND, a witness of lawful age, produced and sworn on behalf of libellants, deposes and says:

By Mr. HAGNER:

Q. State your name, age, residence, and occupation.

A. George A. Nowland; 40 years of age; I reside in Alexandria, Va., and am the chief clerk of the Marine Railway and Shipbuilding and Coal Co.

Q. Are you familiar with the amount already expended by way of marine railway on the Ellen Tobin for repairs?

A. Yes.

Q. How much is it up to date?

A. From the 31st day of March, 1894, to June 26, 1894, the total amount of expenditures for labor and supplies furnished is \$6,063.62 by abstract. There is something to be added; I can't say exactly what that is. It is for treenails and wedges due by the vessel, not

been added in the abstract, and can't be added until we are through treenailing and we can see how many is left.

Q. Has Mr. Curtis, the owner, furnished anything independent of this bill?

A. Yes.

Q. What?

506 A. Well, he furnished a considerable part of the fastenings, nearly all of the iron, spikes, and fifty-two feet of the keel. He sent several coils of rope; I don't know how much rope.

Q. Are you putting in any centerboard?

A. No, sir.

Q. How much, in your opinion, would it take to finish the vessel, irrespective of her rigging?

A. The expenses of the ship yard will reach at least \$7,000, independent of the rigging and of independent of any expenditures made by the purchaser. The difference will be made up by repairing her decks, which has not yet been done.

Q. Is this bill, or not, independent of the sum of \$1,000 which Mr. Curtis paid for the vessel?

A. Yes; independent of the purchase price.

Cross-examination.

By Mr. BARNARD:

Q. How much of this estimated \$7,000 will be for the charge of laying on the ways?

A. I would have to separate that. The railway charge is \$10 per day. The hauling—our charge is \$43.50.

Q. How long do you anticipate it will take to complete her?

A. Well, so far as my judgment goes, I will say 15 days.

Q. How long was she on the ways?

A. She was hauled up the 31st day of March, 1894, and launched on the 23rd day of June, 1894.

Q. Was that as quickly as she could have been repaired correctly?

507 A. Well, she has had all the men on her that the owner wanted to put on her.

Q. Did you make an estimate to Mr. Smith for repairing this vessel before the present owner bought her? If so, what was it?

A. I never made any estimate to Mr. Smith. I wanted him to buy her and I told him I thought she could be fixed for a few thousand dollars.

Q. Did you tell him how many thousands?

A. I don't know. I don't think I did. I never made any estimate of the amount she would cost.

Q. Didn't you tell him that in your opinion or judgment she could be repaired for four thousand dollars?

A. Not to my knowledge.

Q. Do you mean by that that you cannot recollect?

A. No, sir; I never made an estimate on the amount of repairs, and therefore could not have named any particular amount to do the work.

Q. What were you wanting Mr. Smith to buy the boat for?

A. I wanted him to buy her to have her repaired.

Q. You were soliciting a job for the ship yard is that?

A. Yes, sir.

Q. Didn't you tell him that you thought she could be repaired for \$3,000 to \$4,000?

A. Not to my knowledge.

Redirect:

Q. She had been on the ways before the 31st of March, 1894?

A. Yes, sir; Mr. Lord had her there, and then we bought her, and then we spent on her a hundred or so dollars, fixing her so we could put her overboard and use the railway.

508 Recross:

Q. Are you renewing the boat sufficiently to enable her to be insured by the Marine Insurance Co.?

A. She is being rebuilt under the underwriters' inspector and has passed first-class inspection by the United States local inspector as to seaworthiness. That is a special examination made on her.

Q. Will she be as good, in your judgment, as a new boat when completed?

A. I wouldn't say she would.

Q. What parts of her have been used and what parts made new?

A. There have been 52 feet of new keel put in her—new timbers for that distance—new keelson, new sister keelson, new ceiling, new beams, new knees, and she will have new decking—that is, the distance of the damage.

Q. It is in evidence here that the Tobin was at one time rated in the record as "A No. 1," with a red star. From what you say here she is to be rated in the same way—in the same way, with some slight addition. What is that addition?

A. What the owner says is that by complying with the underwriters' inspector it will be A No. 1½ for 5 years.

Q. Is the ½ added to the No. 1 indicative of her being better?

A. I can't answer that question. I infer not.

GEO. A. NOWLAND.

Subscribed and sworn to before me this 28th day of June, 1894.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*

The further taking of the testimony is here adjourned subject to notice.

RUTLEDGE WILLSON,

*Sp'l Comm'r.*



JULY 6, 1894.

Proctor for libellants here announced his testimony-in-chief closed except his right to show future expense for completing repairs of schooner Ellen Tobin.

RUTLEDGE WILLSON,  
*Sp'l Comm'r.*

(Here follows exhibit marked p. 509.)

510 *Motion to Limit Respondents' Time in Taking Testimony.*

Filed Sept. 27, 1894.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	}	Admiralty. No. 379.
<i>vs.</i>		
CHARLES G. SMITH <i>et al.</i>		

Now come the libellants, by Randall Hagner, their proctor, and move the court to limit the time for the respondents to take their testimony in this cause.

RANDALL HAGNER,  
*Proctor for Libellants.*

*Order Directing Respondents to Close Their Testimony.*

Filed Sept. 29, 1894.

In the Supreme Court of the District of Columbia, the U. S. District Court.

CHARLES BURNETT <i>et al.</i>	}	In Admiralty. No. 379.
<i>v.</i>		
CHARLES G. SMITH <i>et al.</i>		

This cause coming on to be heard upon the motion of complainants, filed herein September 27th, 1894, and it appearing that respondents had notice of said motion, it is thereupon, this 29th day of September, A. D. 1894, ordered that the respondents close

511 their testimony within sixty days from this date.

W. S. COX, J.

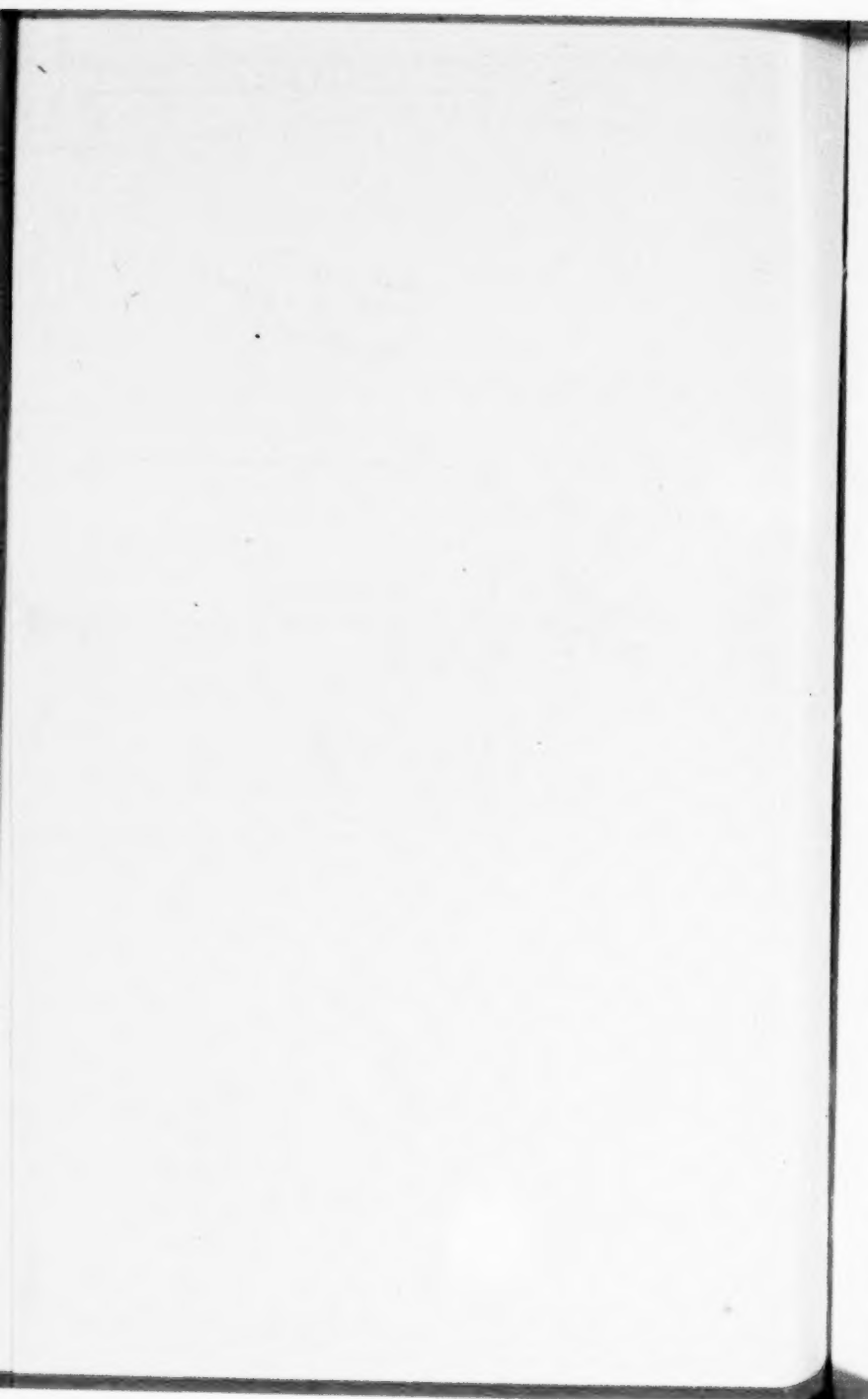
*Order Appointing E. L. White Examiner.*

Filed Oct. 23, 1894.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States in and for said District.

CHARLES BURNETT <i>et al.</i> , Libellants,	}	No. 379.
<i>vs.</i>		
CHARLES G. SMITH <i>et al.</i> , Respondents.		

By consent of the proctors for the respective parties, it is, this



twenty-third day of October, A. D. 1894, by the court ordered that E. L. White be, and he is hereby, appointed special commissioner to take the testimony on behalf of the respondents and cross-libellants in the above-entitled cause, and said testimony shall be taken down in shorthand and transcribed in typewriting and returned to this court.

W. S. COX, J.

Consented to.

NATH'L WILSON,  
*For Respondents.*

I consent to the above, Mr. Wilson having signed in lead pencil.

RANDALL HAGNER,  
*Proctor for Libellants.*

512

*Respondents' Testimony.*

Filed Feb. 12, 1895.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States for said District.

CHARLES BURNETT *et al.*, Libellants,

*vs.*

CHARLES G. SMITH and CHARLES G. SMITH, JR., Libellees. } No. 379.

CHARLES G. SMITH and CHARLES G. SMITH, JR.,

*vs.*

CHARLES BURNETT *et al.* } No. 379.

WASHINGTON, D. C., November 13th, 1894—8 o'clock p. m.

Met pursuant to agreement.

Present on behalf of Charles Burnett *et al.*, Mr. Randall Hagner.

Present on behalf of Charles G. Smith and Charles G. Smith, Jr., Mr. Wilson and Mr. Barnard.

Whereupon CHARLES G. SMITH, JR., a witness of lawful age, called by and on behalf of Charles G. Smith and Charles G. Smith, Jr., having been first duly sworn, is examined—

513

By Mr. WILSON:

Q. Please state your name, age, residence, and occupation.

A. My name is Charles G. Smith, Jr.; I am twenty-seven years of age; I reside at No. 2145 N street N. W.; I am a member of the firm of Charles G. Smith & Son, operating the quarries of the Potomac Stone Company.

Q. You are one of the parties respondent in the libel filed in this case?

A. Yes, sir.

Q. By Charles Burnett and others, owners of the schooner Tobin?

A. Yes, sir.

Q. Will you state who composed the firm of Charles G. Smith & Son in August, 1893?

A. Charles G. Smith and myself.

Q. Charles G. Smith is your father?

A. Yes, sir.

Q. In what business is the firm of Charles G. Smith & Son engaged at that time?

A. In operating the quarries of the Potomac Stone Company.

Q. Had you a wharf; and, if so, where?

A. We had a wharf in Georgetown between 32nd and 33rd streets. There is no 33rd street, but it was in the neighborhood of 3220 Water street.

Q. What business was carried on at the wharf?

514 A. Crushing stone, handling building stone and hauling from there, loading vessels and scows, and unloading scows.

Q. Had you been engaged in crushing and shipping stone at that place for some time previous to August, 1893?

A. Yes, sir.

Q. For how long?

A. For something over three years; about three years.

Q. For what place and under what general arrangement was broken stone shipped from your yard?

A. It was shipped to different places.

Q. Did you have contracts for supplying broken stone?

A. Yes, sir.

Q. In August, 1893, did you have any contract for supplying broken stone?

A. Yes, sir.

Q. With whom?

A. We had a contract with the engineer department for broken stone, to be delivered at Fort Monroe, Virginia, and at Fort Washington.

Q. What time did that contract cover?

A. There were two contracts. The first contract covered the year 1892, and was completed in the spring of 1893. At the time we completed the first contract we had also been awarded another contract, and the deliveries on the two contracts were continuous up to that time. We completed the first contract and commenced the second in the spring of 1893.

515 Q. When did you first see the captain of the schooner Ellen Tobin?

A. On the Friday morning after he reached the wharf.

Q. That was on what morning in August?

A. On the third or fourth.

Q. In August, 1893?

A. Yes, sir.

Q. Where did you see the captain?

A. In Mr. Lee's store or office.

Q. Where was the Ellen Tobin at that time?

A. Loading stone under the crusher.

Q. At your wharf?

A. At our wharf.

Q. Prior to meeting the captain at Mr. Lee's store what, if any, conversation, agreement, or contract had you made with him relative to loading at your wharf with stone?

A. None whatever.

Q. State what was said by you to the captain and what was said by him relative to the loading of the vessel at the time you refer to in Mr. Lee's store in Georgetown.

A. I think I was in the store or in the office when the captain came in, or the captain was there when I came in; I don't remember which it was. Mr. Lee introduced me to the captain, and said to the captain that I was the party who was loading the vessel. The captain made some remark as to when we would be apt to finish the loading, and I think I said on Monday or Tuesday; that we

516 loaded in the neighborhood of one hundred and twenty-five to one hundred and fifty tons a day. There was some other

little conversation as to his wanting to get away as soon as he could, and I told him that we wanted him to get away as soon as we could load him. He then asked something as to the amount of depth of water in front of the wharf. I think he asked what the depth of water was in front of the wharf. Mr. Lee answered the question. I do not know whether the captain asked me or asked Mr. Lee, but Mr. Lee answered him by saying that it had been dredged out in the spring to the supposed depth of fourteen feet. The captain had some conversation with Mr. Lee, I think, as to about what water he drew, and he also said that it would not hurt him to lay on the bottom if the bottom was in decent shape. I told him I did not know just what the bottom was, but that I would advise him to make his soundings there and to find out from time to time just how his vessel was laying, and that I would see that he had any assistance he wished in moving the vessel forward or aft or shoving her out; that we would do just what he wanted done, and that after he made his soundings he could tell me what he wanted done. I told him that we had loaded vessels as large as his vessel, and mentioned one or two that were larger, where I had told the captain, as it has been my invariable custom to do, to make their soundings as they loaded. I referred especially to the Sunlight and stated—

Q. To the schooner Sunlight?

A. To the schooner Sunlight. I stated that we had loaded her, and I believed that she was a larger vessel than the Tobin; 517 that we had put in the last hundred tons or so by putting in two scows, and wheeling on board across the scows—wheeling from the bins with wheelbarrows. I told him we would do that or anything else that he wanted if he would indicate what he wanted. That is about the extent, I think, of our conversation.

Q. What, if any, reply did he make?

A. He said that he would sound. He assented and seemed to understand.

Q. This conversation occurred at Mr. Lee's store?

A. Yes, sir.

Q. What, if any, authority did Mr. Lee have from you or from your firm, either oral or in writing, to represent your firm or to charter or employ any vessels?

A. None whatever.

Q. What, if any, authority did Mr. Lee have to make any representations or statements in regard to the loading of vessels or as to the condition of your wharf?

A. He had no authority. I presume he used his judgment as to what he thought.

Q. The wharf was owned by you or your firm?

A. No, sir.

Q. Leased by them?

A. Yes, sir; leased.

Q. State if it was in any way a public wharf or if any charge was made for wharfage either to the Tobin or to any vessels loaded there.

Mr. HAGNER: I object to that as immaterial and irrelevant.

518 A. There was no work of any kind done there at the wharf except that in connection with our own business. No money was paid for wharfage, and the wharf was never let to any one or to any vessel.

Q. There was no charge made for wharfage?

Mr. HAGNER: I object to that as immaterial and irrelevant.

A. No, sir; not for the use of the wharf, against the Tobin or any other vessel.

Q. What was the course of business by your firm in relation to obtaining vessels and loading them with stone and shipping them? How was the business carried on?

Mr. HAGNER: I object to that as immaterial, since the custom could not obtain.

A. You refer to this contract at Fort Monroe, I presume.

Q. With reference to the loading and shipping of stone.

A. The contract that we had with the engineer department of Fort Monroe was of such size that we loaded pretty regularly.

Mr. HAGNER: I want to object to anything in regard to the contract with the people at Fort Monroe as immaterial and irrelevant.

The WITNESS (continuing): And we generally had some vessel laying there ready to take a cargo, or there generally seemed to be some vessel that was looking for it at the time we were ready to load. Of course, we worked it in with other business. Sometimes we would not load for several days; sometimes we would load continuously for a week, and sometimes a vessel would lay there for several days waiting for a load. There was no regular arrangement about it. Mr. Lee could see from his back window about what vessels we got out of the way, and he therefore knew about how many to supply or how many we could load. Sometimes a vessel would come or we would expect to load a vessel and she would conclude to take something else; she would not wait. They did pretty much as they pleased; but we had no scarcity of vessels.

Q. Was there any arrangement or agreement made with your

knowledge or by your authority with the captain of the Ellen Tobin concerning the quantity of stone that was to be taken?

A. No, sir.

Q. State if it was optional with him to take much or little; whether he could have gone away from the wharf with a part of a cargo if he had chosen to do so.

A. It made no difference to us.

Q. How was the price per ton determined?

A. The price per ton was standard and regular; it was always the same. We never paid more or less than fifty cents a ton.

Q. That price was fixed by you?

A. Yes, sir.

Q. That is the price you would pay for the stone to what point?

A. To Fort Monroe.

Q. State if any vessels that came along were at liberty  
520 to take a cargo or to leave it as they chose at that price.

A. Yes; we never made any different offer.

Q. Was Mr. Lee paid by you at any time in respect of his services?

A. No, sir.

Q. In obtaining vessels?

A. No, sir.

Q. What vessel loaded at your wharf just before the arrival there of the Ellen Tobin?

A. I do not remember; I could ascertain by looking up the bills of lading and the books; I do not remember now.

Q. This accident to the Tobin occurred in August, 1893. Can you state about how many vessels were loaded at your wharf during that year and the size of them?

A. During the year 1893?

Q. Yes.

A. Previous to the accident to the Tobin?

Q. Previous to that time.

A. Fifteen, I should say.

Q. During that year?

A. Yes, sir; and possibly twenty.

Q. Do you remember the names of any of them and what their capacity was and how much water they drew?

A. I do not remember particularly as to the year 1893. A good many vessels were loaded in 1892 and again in 1893. I remember  
521 two or three vessels that we loaded in the spring; I think we loaded the Mattie B. Russell some time not so very long before the Tobin, but I do not recollect now as to the date; we loaded the Mattie B. Russell, the Sunlight, and the A. Denike; none of those that were loaded for Fort Monroe were loaded much more than a year before the Tobin—from a year to a year and a half.

Q. Have you the bill of lading for the stone shipped on the schooner Sunlight to which you have referred and any other bills of lading for vessels carrying five or six hundred tons?

A. Yes, sir; we have them all.



Q. If so, just produce them.

(The witness produces the bills of lading above referred to.)

The WITNESS: These are all our bills of lading for shipments.

Mr. WILSON: The above-mentioned bills of lading are offered in evidence by counsel for Charles G. Smith and Charles G. Smith, Jr.

The above-mentioned papers are filed herewith and marked respectively Exhibits C. G. S. Nos. 1 to 6, inclusive.

Exhibit C. G. S. No. 1 is the bill of lading for the schooner Sunlight, 700 tons, October 14th, 1892.

Exhibit C. G. S. No. 2 is the bill of lading for the schooner A. Denike, 650 tons, March, 1893.

Exhibit C. G. S. No. 3 is the bill of lading for the three-masted schooner John R. Fell, 520 tons, July, 1892.

522 Exhibit C. G. S. No. 4 is the bill of lading for the schooner Henry D. May, 490 tons, November, 1892.

Exhibit C. G. S. No. 5 is the bill of lading for the schooner Mattie G. Russell, 550 tons, December, 1892.

Exhibit C. G. S. No. 6 is for the schooner S. B. Wheeler, 425 tons, December 15th, 1892.

By Mr. WILSON:

Q. How was the captain's compensation to be determined in respect to the transportation of the cargo—the number of tons on board?

A. Returns were made by the Government from Fort Monroe through Mr. Lee to the captain. The engineer officer in charge of Fort Monroe endorsed on the back of the bill of lading the number of yards of broken stone landed, and returned that bill of lading over to the captain, and the captain forwarded the bill of lading to Mr. Lee. Mr. Lee collected the freight of us for the vessel. The number of tons was determined by figuring the number of yards returned by the Government at the rate of twenty-five hundred pounds to the yard and two thousand two hundred and forty pounds to the ton.

Q. And the freight that the Tobin was to carry was to be determined and paid for in that same way?

A. Yes, sir; they were all paid in the same way.

Q. After this interview at Mr. Lee's store when did you next see the captain?

A. I have no recollection of seeing him again, although I may have seen him on his vessel or some other place about the wharf. I have no recollection of seeing him again until the Monday evening afterwards—after the vessel had sunk.

523 Q. Before you refer to that interview I wish you would state what was the organization and who were the employes at the wharf at the time the Ellen Tobin began to load, and what were the duties of the men who were there engaged in loading and bringing stone.

A. There was the licensed engineer, Mr. Speaker, in charge of

the engine and generally in charge of the machinery. There was a man at the hoister, who hoisted the stone from the scow, and the foreman inside. On the outside there were two feeders for the crusher, the man who was outside in charge of the chutes, and 5 men on the scow. At the time we were loading a vessel there were men in the hold generally in charge of a sort of subforeman, a darkey, who looked after that under the directions of the captains of the vessel. That was about all the organization in relation to the crusher plant. In the yard we had men who were in charge of the yard and teams.

Q. Who determined and directed where the stone should be put on the vessel?

A. The captain of the vessel.

Q. Who determined how much should be put on?

A. The captain.

Q. What were the duties of Mr. Speaker?

A. His duties were to crush the stone and open the chutes to the wagons or to the vessels, as he might be directed, and he had charge of the engine. He was the engineer in charge of the engine.

Q. What, if any, authority or power was given to him by you or by your firm with reference to directions as to the position of the vessels at the wharfs and their movements?

A. He had no authority as to the position of the vessels or as to the movement of the vessels. He was supposed to load into the hatch, under the directions of the captain of the vessel, and to open his chute and turn the stone into the hatch as directed by the captain and to assist the captain in moving his vessel.

Q. What, if any, authority had he to make representations to the captain of the Tobin or to any one else in respect to the condition of the wharf, the water, or the bottom at the wharf?

A. He had no authority.

Q. Where is Mr. Speaker now?

A. He is in Georgetown, I guess.

Q. Is he still in your employ?

A. Yes, sir.

Q. Now, coming back to the morning after the vessel sunk, will you state what occurred between you and the captain?

A. It was the evening of the Monday after the vessel sunk that I saw the captain. I had been out in the country and did not get back until six o'clock or so, and I probably got to the wharf by half past six. I looked at the vessel from the wharf and afterwards went on board and looked at her. The captain was on board and there was very little conversation. I asked him if she was afloat all right on Friday, and he said yes. I asked him if she was on Friday night, and he said yes, and on Saturday he said yes. I then asked him about Saturday night, and he said yes, so far as he knew. That is about all.

Q. What, if any, complaint did the captain then make in respect to the condition of the bottom there at the wharf or in respect to the statements that had been made to him?

A. None whatever.

Q. That was the last conversation you had with the captain?

A. He was around about the wharf there for two weeks.

Q. I mean with reference to the circumstances of the sinking.

A. Yes; I did not talk the matter over with him.

Q. Do you remember of seeing the ship's husband or the managing director or any of the owners after that?

A. I think Mr. Endicott was there two or three days after that and I saw him.

Q. Where?

A. I think I saw him out on the wharf.

Q. Did you have any conversation with him?

A. Not at that time.

Q. Did you afterwards?

A. I think something like a week or ten days afterwards—the following week—Mr. Endicott was there, and I met him first at Mr. Lee's store. Mr. Lee introduced me to him, and Captain Burnett, an old gentleman, and I had some conversation with them at that time.

Q. State what the conversation was with regard to the vessel.

A. Mr. Endicott said that it was an unfortunate affair for somebody, and that he considered we were responsible, and  
526 wanted to know what, if anything, we were ready to do. I told him that I did not have anything to say; that if he had anything to say of course I would be glad to hear it. He stated that they valued the vessel at ten thousand dollars, and that he considered she was a total loss. He conferred with Captain Burnett, I think, as to whether they wanted to make any proposition, and I believe that after talking with him at one side they stated that they would close the matter by turning the vessel over as she was to us, we to pay them five thousand dollars. I told him that I did not have any idea we would consider that; in fact, that I could almost state positively we would not consider that. He stated that they considered that was a compromise offer; that the vessel was worth more; that they had no desire to go into the courts, but would prefer to settle it outside of the courts between ourselves if it was possible. Captain Burnett said it was one of those matters where if it went into court it would probably be shown and probably be decided that it was part their fault and part our fault, and that it would be difficult to say just how it might come out, and therefore they would prefer to settle the matter outside of the courts. They wanted to know again if I had anything to say. I told them that if I had anything to say I would let them know that afternoon. On that afternoon they came into the office, and I told them that I had nothing to say. They then stated, either Captain Burnett or Mr. Endicott, that they proposed to let the vessel lay there; that they did not propose to raise  
527 her, and did not propose to do anything towards getting her out of the way. I told them that the vessel was a very serious impediment to our business as she lay there, and that she was a constant source of expense to us in handling stone, and that the damage was considerable. I told them that on our part we

would hold them for any damages that might result from her laying there. Captain Burnett stated that they had made their proposition, and that they would not make any more; that they were going to fight the case, and that they would let the vessel lay there until she rotted.

Q. That was at about what time? Fix the date as nearly as you can.

A. I suppose that was ten days after the vessel sunk; that was my recollection of it. It was the week following the first week—that is, the second week, and near the first or middle of the second week after the vessel sunk; at least that is my recollection of it.\*

Q. When was the effort made and the first work actually done in respect to the raising of the vessel or her cargo?

A. The first effort that was made and the first work that was done was at the time of the first arrangement that they had with Mr. Lord. I think it was some time in October that the first work was done. I am not positive as to that date.

Q. What was that work, and by whom was it done?

A. Mr. Lord undertook to pump her out, and I believe he worked a day.

Q. You saw that done?

A. Yes; I saw him around there.

528 Q. He began work some time in October?

A. Yes; that is my recollection.

Q. He continued how long?

A. I guess about a day or a day and a half, maybe.

Q. What then happened?

A. He stopped.

Q. When was the next work done in the effort to raise her or get out the cargo?

A. Not until he raised her successfully, in the last of November.

Q. On what date was she actually taken away?

A. She was raised on the 23rd of November, and from the time that he commenced work regularly on that day it took about an hour to pump her afloat and take her away.

Q. So that when the work of pumping the second time had actually begun an hour's work was sufficient to raise her and get her out of the way?

A. Yes, sir.

Q. Please state what, if any, injury or damage was caused to your firm and to your business by the Tobin remaining where she sank from August 4th to November the 23rd.

Mr. HAGNER: I object to this question on the ground that it is not in the mouth of any person who has either in a collision or otherwise injured a vessel to claim damages for the raising of the vessel or to sustain any libel or cross-libel of any nature for such raising or for injury to her cargo.

529 A. It was a continual loss and damage to us to have the vessel laying there. She laid just outside of the scows that we had to shove in and out to reach our machines, and there

was barely room for the scows to be moved back and forth. When a scow was unloaded we would have to shove it back of the vessel and shove another in around the bow; then shove it out at the bow and shove another in back from the stern. At low tide, the wharf being close under the hoister where we raised the stone, the water was shallow, and we needed more room to freely handle the scow, which delayed us in crushing and getting stone through the crusher. In loading other vessels we had to load across the Tobin, and in loading and unloading stone generally at the wharf it was an expense on every yard of stone handled from that time on.

Q. Please state if you made a memorandum or itemized account of the loss caused by the delay and the difficulty in loading vessels at the wharf in consequence of the presence there of the Tobin.

Mr. HAGNER: I object to any memorandum that was made in that regard unless it was made exactly at the time.

By Mr. HAGNER:

Q. Did you put those various items down at different times or all at one time?

A. I figured it up and made a memorandum of it at the time the cross-label was filed.

Mr. HAGNER: I object to it.

The WITNESS: Shall I read this memorandum?

Mr. HAGNER: I object to his reading the memorandum. I object to the witness reading any memorandum made at the  
530 time he was cooking up an account.

The WITNESS: I could not make it before, because the vessel was just out of the way. Shall I read the memorandum?

Mr. WILSON: Yes, sir.

Mr. HAGNER: I object to it.

The WITNESS:

"Loading on vessels and scows about three thousand tons of stone from August, after the Tobin sunk, until November, at the expense of twenty cents a ton. ....	\$600
Running crusher for sixty-three days, as shown in time book from August 7 to November 17th, at an additional cost of loading tugs from scows and loss of time at low tide and loss of stone by same falling in water and cutting down the capacity of the machines, at twenty dollars a day.....	1,260
Damage to scow by reason of same catching on anchor of the Tobin and sinking.....	200
Loss of stone by scow outside of Tobin dumping her load on account of not being able to get to scow and get the scow in under the chute, and damage to scow.	400

Total..... \$2,460 00"

Mr. WILSON: I desire to offer in evidence this memorandum as being a statement of the items of loss and damage.

The above-mentioned memorandum is filed herewith and marked Exhibit G. B. S. No. 7.

Mr. HAGNER: I object to this as being no good as a memorandum, for the reason that the witness has stated that it was not made contemporaneously with the various items; and, secondly, because it is not in the mouth of a person injuring a vessel to state  
531 the damage caused by that vessel not being capable of being gotten out of the way.

The WITNESS: It was taken from material that was made contemporaneously.

By Mr. WILSON:

Q. How were the items of damage, stated in the memorandum of which you have just spoken, ascertained and computed by you?

A. I know the amount of stone that we handled, from our books, the number of vessels that were loaded, the number of scows that were loaded, the number of scows that were unloaded, the number of yards of stone that we crushed, the number of days the crusher ran, the damages to the scow, the work that we did on the scow, and the loss of the stone, which was seen at the time.

Q. What, if any, notice was given to the owners or the agent of the owners of the Ellen Tobin that you would hold them responsible for damage caused by them allowing the Tobin to remain where she sunk?

A. I gave them notice at the time they were in the office, and Mr. Barnard wrote them later.

Q. Is the letter written by Mr. Barnard to which you refer already in evidence in this case and offered by the libellants?

A. I think it was.

Q. Did you receive any answer to that letter?

A. I did not.

532 Q. You have spoken of the number of vessels that were loaded at your wharf in 1893, before the happening of this accident and in 1892. Will you state if any vessel that was loaded at your wharf prior to the date of the accident to the Tobin got aground or was in any way injured by being aground while at your wharf or while being loaded?

Mr. HAGNER: I object to the question as not being sufficiently definite as to time.

A. I think that vessels have touched the bottom there.

Q. That was not the question. I ask you if any vessels were injured?

A. No; the only one that there was any *any* question about was this Francis R. Baird. There has been some evidence given in regard to her.

Q. Did she touch?

A. Yes, sir; she touched.



Q. When was that?

A. That was in December, 1892, and on a very low tide—the lowest tide I have ever seen there before or since.

Q. Was she gotten off without difficulty?

A. Oh, yes; he got away and went and delivered his cargo.

Q. With that exception there was no trouble with any other vessel?

A. No.

Q. Did you examine the Ellen Tobin at any time after she left Georgetown?

A. Yes.

533 Q. Did you see her when she was at Agnew's yard?

A. Yes.

Q. In the dry dock?

A. Yes.

Q. Describe the appearance of her bottom.

A. In reference to the spot where she was supposed to have been struck or generally?

Q. Generally.

A. I am not a ship carpenter.

Q. Describe her just as she looked to you.

A. She looked about as a vessel would ordinarily look on a dry dock, and she laid in good condition to look at. At the time I saw her hauled out she had had some timbers taken out right amidships, where there was a little raise in the bow. We measured it, and I think it was seventeen inches that she seemed to be out of line at that point. At other points through the hull of the vessel she showed marks where she had been calked and patched with red lead, apparently so that she would not leak when they put her overboard. I think this was just after she had been overboard, to get her out of the way there for the time being, and they had just patched her up a little so that she would not sink. It was just after she had been hauled out the second time when I saw her. She looked pretty decent there.

Q. Were there any spike holes in her?

A. Yes, sir; I noticed quite a number of spike holes, where the spikes had rusted out and rotted out. The spikes were common iron spikes, and I presume the action of the water had rusted them away. It showed rust, and when you would tap it or try it with a steel point it gave way or would partially open, and in some cases it ran clear through the planks.

Q. Had you received any notice or had you any knowledge of the existence of a rock near your wharf of the character such as has been described here by the witnesses for the libellants, and particularly by the diver who was here?

Mr. HAGNER: I object to the question on the ground that it does not make a particle of difference in law as to whether or not he knew there was a rock there, as the law presumes his knowledge of any obstruction in the bottom of the berth.

A. I had no notice of any one that had controlled the wharf be-



fore we leased it, and no notice from any one after, and no knowledge of any rock or obstruction that would damage a vessel.

Mr. WILSON : The letter from Edwards & Barnard to Mr. Endicott, dated August 24th, 1893, and referred to in the testimony of this witness, is marked Libellants' Exhibit A, and is found at page 392-2 of the libellants' testimony.

The further taking of these depositions was thereupon adjourned until Wednesday, October 14th, 1894, at 1 o'clock p. m.

535 WASHINGTON, D. C., November 14th, 1894—1 o'clock p. m.

Met pursuant to adjournment.

Present : On behalf of the libellant, Mr. Hagner.

Present : On behalf of the libellees, Mr. Wilson and Mr. Barnard.

*Cross-examination of Charles G. Smith, Jr.*

By Mr. HAGNER :

Q. How long have you resided at No. 2145 N street ?

A. About a month.

Q. Where did you reside prior to that ?

A. At 1729 19th street.

Q. How long did you reside there ?

A. Two years.

Q. You were residing at No. 1729 19th street at the time of the accident to the Tobin ; is that right ?

A. Yes, sir.

Q. Have you a country place ?

A. No.

Q. Has your father a country place up in Virginia ?

A. Yes.

Q. Where is it ?

A. It is just across the line from Loudon county ; it is in Clark county.

Q. How far is it from Georgetown ?

A. Fifty-odd miles.

536 Q. Has he any other farm there in Virginia ?

A. No ; not at present.

Q. Have you any farm in Virginia ?

A. No, sir.

Q. Had you in 1893 ?

A. No.

Q. Had he in 1893 ?

A. No.

Q. Just refresh your recollection about that.

A. That is right. He had one there, but he had sold it.

Q. Where was it ?

A. Away back in the country from Georgetown.

Q. How far from Georgetown ?

A. Three or four miles.

Q. Near what place was it ?

A. About three miles back, somewhere near what they call the Phillips place over there. I cannot describe it any closer than that.

Q. In what county was it?

A. In Alexandria county; but he did not own it at that time.

Q. Were you living on 19th street during the whole of the year 1893?

A. Yes.

Q. Where was your father living during the month of August, 1893?

A. I think he was in the country all the time, or nearly all the time.

537 Q. The whole month of August?

A. I won't say positively. He might have been in; no; not during the whole month of August. He came in along about the 7th or 8th of August. He was in town.

Q. Then from the 1st of August up to the 7th or 8th of August he was away from town, was he?

A. Yes.

Q. He was absent, then, from Georgetown during the week beginning August 5th, 1893—is that right?

A. Yes; that is my recollection. I do not think he was in.

Q. He was not there when the injury occurred to the Ellen Tobin?

A. No.

Q. You were not there, were you?

A. I was not there. I was not in the city on Sunday; no.

Q. When did you leave the city prior to that time?

A. I left the city on Saturday?

Q. At what time?

A. Between nine and ten o'clock on Saturday morning.

Q. How many quarries were you operating, Mr. Smith?

A. I could not answer that question. We worked in different quarries along the line at different times. I cannot say.

Q. How many quarries are there up there?

A. I cannot answer that. There must be twenty open quarries.

538 Q. How many quarries did you lease from the Potomac Stone Company?

A. We leased about two miles and a half of river front; part quarries and part has not been opened.

Q. Those quarries were leased by your firm?

A. Yes, sir.

Q. And those that had been opened were in operation at that time—during the year 1893?

A. Oh, no.

Q. How many of them?

A. That I can't answer. I don't know just how many at that time; two or three, I suppose.

Q. How many quarries have you worked since you have been in Georgetown in business?

A. We worked the Potomac Stone Company's quarries and Mr. Vanderwerken's quarries.

Q. How many of the Vanderwerken quarries?

A. We have them all, but we have not worked them all.

Q. Were they leased also by Charles G. Smith & Son?

A. Yes.

Q. The two sets of quarries, then, those belonging to the Poto-mac Stone Company and leased by you and those belonging to Vanderwerken and leased by you, extend from what point on the river?

A. They extend from the Chain bridge down to Rock Hill park, with a little interval, one hundred feet or so, in between, I think.

Q. By whom was that one hundred feet controlled?

539 A. I think the Cranford Paving Company control it.

Q. They control one hundred feet?

A. It is more than one hundred feet. I think it is two hundred or two hundred and fifty feet.

Q. They work a quarry there, do they?

A. Yes.

Q. And were working it in 1893?

A. I think so.

Q. How many men altogether were you working? How many was the most men that you have ever worked at one time since you have been in business in Georgetown?

A. I suppose as many as five or six hundred.

Q. At a time?

A. Yes.

Q. At one time?

A. Yes.

Q. In what year was it that you were working between five and six hundred men?

A. 1891 and 1892. Along in both those years they ran up pretty well.

Q. How many in 1893 or up to August, 1893?

A. I could not say exactly. I suppose—

Q. About how many?

A. I suppose a hundred and fifty.

Q. Did you work more men in the spring of 1893 than you did in August?

A. Yes.

Q. How many more?

540 A. I have to guess at that.

Q. As well as you can remember; that is what I mean, of course.

A. We were busier in the spring than we were in the fall, and I presume that we worked from fifty to a hundred men more; somewhere along in the neighborhood of two hundred men. We were not very busy in all of that year.

Q. Take Exhibit B with the libel and see if that is the firm signature, signed by you (exhibiting the signature to the witness).

A. Yes, sir.

Q. Do you remember whether or not I was present with you and Mr. Barnard when you signed that?

A. That is my recollection.

Q. Do you remember at or about that time of my telling you and Mr. Barnard that we had a bid from wreckers to raise the Ellen Tobin for eight thousand dollars? Do you remember that, on or about that time?

A. No, sir.

Q. Or a day or two after that?

A. I don't remember anything about the amount.

Q. What is that?

A. I don't remember anything as to the amount named.

Q. Do you remember that, in Mr. Barnard's presence and myself, I stated to you and Mr. Barnard that the lowest bid we could get for raising the Ellen Tobin was eight thousand dollars, and that I asked you and Mr. Barnard whether I should close with the parties making that bid or whether I should take a longer time to look after  
541 some one who would give a separate bid for taking the stone out of the vessel, in anticipation that we might get it done cheaper than for eight thousand dollars? Do you remember that circumstance?

A. I think there was some conversation in that line, but I do not remember it now.

Q. Do you remember that at that time you and Mr. Barnard stated to me that it would be very much better to try and get the stones taken out separately, so that it could be done cheaper, and not to close at eight thousand dollars?

A. Of course, I do not know just what Mr. Barnard may have said. I do not remember making any statement myself.

Q. You remember the circumstance that you wanted me to desist from accepting that bid so that we might have the stone taken out cheaper—taking the stone out separately and thereby reduce the price of raising the vessel?

A. I know that there was some conversation in regard to that, but I do not remember making any expression myself at all.

Q. I think you spoke of loading the Sunlight by putting the last hundred tons of stone in with wheelbarrows, did you not?

A. Yes; I think I said something about that.

Q. How much does it cost to do that?

A. It is some extra expense.

Q. What is the extra expense over letting it run down from the elevator into the chute and into the vessel's hold over wheeling it onto the vessel from your wharf there—what is the difference?

542 A. From the chute the stone does not have to be touched after it gets into the crusher. It is shot directly to the vessel's hatch, but to wheel it we have to take it from the bins where we load the wagons.

Q. The little bins I will call them?

A. No; they are the biggest bins there are there and the only bins there are there.

Q. Those are low bins, are they?

A. Yes, sir. The stone that goes to the schooner from the chute

does not go into these bins at all. It is taken directly from the top, over the screen. The loading by wheelbarrows has to be done from these bins where we ordinarily load wagons, and if we are loading wagons the delay is more serious; but if we are not loading wagons the delay is not so much.

Q. What is the expense of shooting the stone from the lower bins into the wheelbarrows and wheeling it onto the vessels? About what is the extra expense per ton?

A. About twenty cents.

Q. About twenty cents a ton?

A. It is quite considerable in the interference with the teams. It is a little difficult to say just exactly what that costs.

Q. In addition to the loss of the use of the teams temporarily it would be twenty cents, would it?

A. Leaving out the question of teams, I do not think it would be as much as that.

Q. It would not be quite as much?

A. No, sir.

543 Q. About how much?

A. It might be done for twelve or fifteen cents. It might be done for twelve cents.

Q. Then the difference between twelve and twenty cents—that is, eight cents—is for the probable expense of the teams not being used just at that time; is that it?

A. Taking the general figure of the situation, that is all.

Q. For how many tons of stone was the first contract that you spoke of with the Government?

A. The contract was for twelve thousand five hundred yards, as I recollect, which would make, in tons, about ten per cent. more. It would make about fourteen thousand tons.

Q. For what amount was the second contract you have spoken of for delivery at Fort Monroe, Virginia?

A. Six thousand yards.

Q. What was the value of that crushed stone?

A. What was the contract price for it delivered at Fort Monroe?

Q. You can give that if you consider that was the value of it. It was worth that to you, was it not?

A. Yes.

Q. What was it?

A. We got that for it. The first lot was two dollars and eight cents a yard and the last lot was a dollar and ninety-seven cents a yard, I think.

Q. One dollar ninety-seven cents a yard—that was how much a ton?

544 A. About ten per cent. more. We figure twenty-five hundred pounds to the yard.

Q. You were getting a little upwards of two dollars a ton then under the contract for the stone that was desired to be sent by the Ellen Tobin?

A. Quite a little.

Q. How much?

A. A ton, you see, is less than a yard, so that we were not getting two dollars a ton for it.

Q. You were getting, then, about ten per cent. less?

A. About ten per cent. less. There are about twenty-five hundred pounds in a yard. That is the way we figure on it.

Q. Then it would be about a dollar and eighty-seven cents a ton, would it?

A. It would be about a dollar and eighty-two or eighty-three cents a ton; somewhere along there.

Q. Will you look at this exhibit again and tell me how you get at the amount of forty dollars for taking that stone out?

A. How I get at it?

Q. Yes, sir.

A. I thought that to be about what it would cost; at least, I told you people that it would cost not over forty or fifty dollars to take that out. Your captain said, "Well, we want to be sure of it. Will you do it for that?" I said, "I don't care about bothering with it. I thought it was a matter for you people to attend to."

545 He said, "Well, we want to know just exactly what it is going to cost; and if you say it is going to cost forty dollars, why won't you do it for that?" I said, "Well, it's only a matter of a few dollars." If we lost anything on it I don't know. I thought that as long as we told them, that we would do what we said.

Q. At that time you were estimating that there were about four hundred tons in the vessel, were you not?

A. Yes; at about ten cents a ton.

Q. How did you make that out? How did you get at there being four hundred tons in the vessel?

A. I did not make that out. That was what the captain said or what somebody said. I did not know what was in the vessel.

Q. Do you not remember who said it? That is what I want to know.

A. That was the captain's idea of what there was in the vessel, I think.

Q. Was it not gotten from your stoneman? That is what I am trying to get at.

A. I'm sure I don't know where it was gotten from.

Q. You say that all the stone that was put in a vessel there loading at your crusher or your wharf—that all the stone put into that vessel through the chute came from the upper bin or the higher part of what I will call the elevator. Is that right? As the stone passed through the chute it had to come to the upper bin?

A. There is no bin there at all.

Q. What will you call it? What is that square box at the top that has stone in it?

546 A. There is no square box at the top for stone.

Q. What is the thing that has stone in it at the top?

A. There is nothing that has stone in it at the top. The stone goes in and comes out at the top. It passes through and does not stop there. It is continuously in action.

Q. Then the stone that goes in through that chute is running

through your crusher, and as it comes from your crusher it runs into the chute; is that it?

A. As it comes from the crusher it is carried by a conveyor belt to the elevator and from the elevator it is elevated to that building in the top and there passes on to the screens, and from the screens the stone goes through the mesh that leads to this chute, and takes the stone through this chute directly from the screen underneath. It drops right through.

Q. And there is no magazine or place of deposit at the top of that elevator?

A. No, sir.

Q. It goes by a continuous belt from the crusher; is that right?

A. Two belts and the elevator is a belt with buckets.

Q. To hold the stone?

A. To hold the stone.

Q. And carry it up?

A. It is the belt from the crusher to this elevator.

Q. How many tons of stone will pass through your crusher up into that elevator in a day?

547 A. It depends upon what sort of luck we have.

Q. When you are having reasonably and tolerably good luck?

A. We would call two hundred tons a pretty good day's work.

Q. Did you ever put two hundred tons through that crusher into a vessel in a day?

A. Sometimes we would put it into a vessel and then we would stop and put it into the bin. It was rarely that we were running all day on a vessel. Sometimes, from the chute, we can arrange it so as to take part to the vessel and part to the bin.

Q. How many tons of stone would your lower bins hold?

A. The lower bins are the only bins there are.

Q. How many tons of stone would those bins hold?

A. If it was trimmed back and filed up I suppose we might get two hundred tons in those bins, but we ordinarily do not run them full, because it was a matter of extra expense to put men in there to shove it back and keep it level. The stone would pile up.

Q. It would hold about how many?

A. If it was as full as it could be without being worked I think there might be a hundred and fifty tons if we filled them all. There were different bins for different kinds of stone.

Q. In running the stone by wheelbarrows into a vessel, what was the course? How did you do it?

A. We had to get skids and skid from the wharf.

548 Q. Big planks were the skids, were they not?

A. Yes; but we call them skids.

Q. And you put them across that space?

A. With trestles on the scows.

Q. You put those across the scows; across that place where the scows always went between the vessel lying there and the crusher. You put those skids across those scows, did you not?

A. Yes; there were always two scows in when we loaded with



wheelbarrows. That was the ordinary course whenever we did it.

Q. And the skids were put there under the bins to the vessel which you were loading. Then you would take your wheelbarrow under the bins, let out so much stone until you got a wheelbarrow load, and then it would be wheeled off to the vessel. Is that right?

A. Yes, sir; that is about the course; but we have to have trestles on the scows. It would take a long skid to run from the wharf to the vessel.

Q. You generally take two skids, don't you?

A. Yes, sir; five or six—that is, we have two runs sometimes.

Q. What you mean by two runs is that there were two sets of skids?

A. Yes, sir.

Q. So that you could use more hands?

A. Yes, sir.

Q. And the average expense of doing that was, as you have already stated, taking all things into consideration, in the neighborhood of twenty cents?

549 A. When we were not loading wagons there it was — quite so serious a delay, and it was a very serious delay when we were loading wagons, because when we were loading wagons the wheelbarrows had to stop, and when we were loading the wheelbarrows the wagons had to stop.

Q. How many wagons were you running in August, 1893?

A. I could not say.

Q. About how many; one or fifty?

A. We were not running fifty. I presume we were running more than one.

Q. Twenty-five?

A. No.

Q. Not as many as twenty-five?

A. No.

Q. Twenty?

A. No; I don't think so.

Q. Ten?

A. We might have been running ten.

Q. Who was the foreman of the wagon department; what was his name?

A. A man named Holmes.

Q. How many quarry foremen did you have up the river at that time?

A. Two or three.

Q. Do you remember their names?

A. A man named Broughton.

Q. Who else?

A. I think there was a man named Sherrier at that time; I am not positive.

550 Q. Who was the next?

A. I cannot say.

Q. You don't remember the others?

A. No; I don't know that there was any other.

Q. How many tugs had you during the year 1893?

A. One.

Q. How many tugs have you had since you have been in business in Georgetown?

A. We never had but one at a time.

Q. How many have you had?

A. We have had only one tug of our own—that we controlled. We occasionally hired tugs at different times.

Q. You were during all this time, 1893, also supplying the United States Government with stone on the river improvements, were you not?

A. Yes; through most of 1863; a part of the time in 1893.

Q. In addition to that you were supplying with stone various buildings here in Washington by wagons that you spoke of?

A. Yes.

Q. How many hours a day, on an average, would your engine run?

A. How many would it run or did it run?

Q. Did it run.

A. About ten hours, ordinarily.

Q. Without intermission?

A. We always stopped for noon.

551 Q. You had an assistant engineer as well as an engineer there, did you not?

A. We had several engineers around the place, but there was no <sup>one</sup> engineer that had charge of the crusher plant and no assistant engineer in charge of the crusher plant.

Q. But you had several engineers around the place?

A. Yes; at different times. I don't know that there was but one besides Mr. Speaker at that time.

Q. Who was he?

A. There may have been two. A man by the name of Godfrey, I think, ran the hoisting engine. He happened to be an engineer. It was not necessary for him to be an engineer; he had no control of the steam. The hoister was run from the same steam that the crusher was run from, and the engineer at the hoister merely run the engine and had no other duty.

Q. What was Godfrey's duty there?

A. He ran the engine.

Q. What was Speaker's duty?

A. He was the engineer in charge of the engine. The engine that Godfrey run was the hoister up above that hoisted the stone from the scow. Speaker had general charge of that and of the machinery of the plant of the crusher. He was ostensibly the licensed engineer in charge of the boiler and engine that run the plant.

Q. Did you order Mr. Speaker to put that vessel further out at any time after Thursday?

A. On Saturday morning before I went away, after I had come down from the quarry, Mr. Speaker made some reference to  
552 the advisabilty of getting another pole in case the captains

were willing to put in two scows, so that the vessel could be shored off a part of the way or all the way, as it might seem best. I sent a note to the quarry foreman to send down another pole or tree on the scow that came down at noon, and I told Mr. Speaker that it might be well, if the captain of the Tobin thought so, to have a second light scow lay in over Sunday and to see the captain of the Tobin and do whatever he wished him to do in the matter. I told him that Saturday morning.

Q. That was before nine o'clock on that Saturday morning?

A. Yes, sir.

Q. At what time did you go there Saturday morning?

A. About six o'clock, I suppose.

Q. Then you went up the river?

A. Yes, sir.

Q. On your tug?

A. Yes, sir.

Q. And then you came back?

A. Yes, sir.

Q. And then you saw Mr. Speaker at the wharf?

A. Yes, sir.

Q. And there you told him, you say, to have another pole cut?

A. No; I did not tell Mr. Speaker, but we talked about another pole, and I gave the captain of the tug a note to the quarry foreman to send down another pole.

553 Q. Do you not know that no other pole came down until the following Monday morning?

A. I know that the pole came down on Saturday—the pole I ordered.

Q. What time did it come down on Saturday?

A. Saturday noon, I think.

Q. What became of it, if you know?

A. It was put out on the wharf, I presume.

Q. You do not know?

A. I was not there on Saturday.

Q. You do not know, then?

A. I do not know of my own knowledge.

Q. Did you have the cargo of stone that was sunk in the Tobin insured?

A. No, sir.

Q. There was no insurance on it?

A. No; we probably would have written for insurance at the time the vessel had been ready to leave, but I had not done it.

Q. Did the captain tell you why he wanted to know when you were going to finish loading?

A. They all want to get away as soon as they can; they are all in a hurry; time is money to the vessel.

Q. Did he happen to mention that he wanted to get a couple of sailors from Baltimore?

A. I do not remember that he did.

Q. You do not remember that?

A. No, sir.

554 Q. And that that was the reason he wanted to know, because he wanted to get a couple of extra sailors from Baltimore—to telegraph for them?

A. I don't remember anything about that. They always were in a hurry and they always wanted to get loaded as soon as they could, and we always wanted to load them as soon as we could.

Q. Did you tell Mr. Speaker to have that lighter put in there by Monday morning?

A. No; I told him to be sure that the captain of the vessel was satisfied as to how the vessel laid from Saturday night to Sunday.

Q. Did you tell the captain in your conversation with him in Mr. Lee's store that he would find a pole to breast her off with at the wharf?

A. No, sir.

Q. You did not mention a pole to the captain at all?

A. No, sir.

Q. You did not tell the captain on that morning when you saw him in Mr. Lee's store that Mr. Speaker would give him a pole?

A. I told him Mr. Speaker would give him anything he wanted and do anything he wanted. If he wanted a pole to shove him off more than one scow, we would give him that or give him two scows.

Q. Are you perfectly sure and can you positively swear that you told the captain it would be necessary for him to use wheelbarrows to get that extra load on, the last part of the load?

555 A. No; I did not tell the captain what it would be necessary for him to do. I told him we would do it if he thought it was necessary.

Q. You are willing to swear positively that you told him that, are you?

A. Yes.

Q. There is no question about that in your mind?

A. None whatever. I mentioned the Sunlight at that time.

Q. Did you mention wheelbarrows at that time?

A. Yes.

Q. You are positive of that?

A. Certainly.

Q. Perfectly certain of it?

A. Yes, sir. I mentioned the fact that we finished the loading of the Sunlight with wheelbarrows and would do the same thing for him if he wanted us to.

Q. You are perfectly certain of that?

A. Yes, sir.

Q. You saw that vessel breasted out there with that pole, did you not?

A. I think she had one pole there?

Q. How long was it?

A. I cannot say; I never measured it.

Q. Where did it come from?

A. I could not say that. The poles usually came from the quar-

ries. There are trees there and we generally cut them down if we needed them for poles.

Q. Was there any peculiar feature about that pole that you remember?

556 A. No, sir.

Q. That the vessel was breasted out with?

A. No, sir; I have no remembrance of anything peculiar about it.

Q. Do you remember whether that pole had two prongs to it at one end?

A. No, sir.

Q. You do not remember that at all?

A. I do not remember.

Q. What was the name of the quarryman to whom you sent the note about that pole?

A. Broughton.

Q. Did you go down into the hold of the schooner Bayard with a lantern to see the condition of her deck beams in December, 1892?

A. I think I went down into the hold, but I do not remember any lantern.

Q. Was there not a lantern down there?

A. I cannot say.

Q. You went down in the hold and examined her deck beams, did you?

A. I think I went down in the hold. I do not know what examination I made.

Q. Do you remember her deck beams being broken?

A. No.

Q. The Baird's beams?

A. No.

Q. You do not remember that?

A. No.

557 Q. Did you make some remark to Captain Cole that the vessel was in a wretched condition? Did you make that remark to him?

A. I don't know that I did. What do you mean by that: that the vessel was in wretched condition from the way she lay or the way she was built or the condition of her hull?

Q. Did you say that the deck beams were worthless and were no good?

A. I don't know that I made any particular remark about the deck beams. I know that there was a piece of rotten wood that somebody said had come out of her or that somebody showed me that had come from the Baird. I don't know where it came from.

Q. Did Captain Cole say that they suited him very well?

A. That what suited him very well?

Q. The deck beams—before they were broken.

A. I think he said that the vessel was not in very good order; that it was a pretty old vessel. I do not remember any of the conversation about deck beams.

Q. You do not? You know what deck beams are, do you not—are you much of a sailor?

A. I don't know so very much about it.

Q. Do you not know what a deck beam is?

A. I suppose they are the beams that hold the deck.

Q. That hold them up?

A. Yes; but I don't know that there was anything the matter with his deck beams.

Q. Did you pay one-half of the bill for sending the schooner Baird down the river?

558 A. I think we paid some little part of the towing down, as the towing was extra on account of the river being frozen up. He wanted to get away, and we wanted to have him get away and get the stone to Fort Monroe, and I think we did pay a part of the bill. I do not know that it was one-half. It may have been one-half. It was something, anyway.

Q. You did that through Mr. Lee, did you not?

A. Yes; Mr. Lee allowed it after the bill of lading came back. We paid Mr. Lee for the captain of the vessel.

Q. I notice here in Exhibit C. G. S. No. 6, with your testimony put in yesterday, that "1555" is written opposite "Lee." What does that mean?

A. I presume that means that Mr. Lee had a bill against the vessel of \$15.55; that he had a separate check for that amount, and that the other check he may have sent on direct to the captain.

Q. That means that Mr. Lee made that commission out of that boat, does it not?

A. Not necessarily.

Q. But you know that Mr. Lee was making a commission?

A. I knew that he made some commission out of the boats.

Q. And that in every instance Mr. Lee was not doing this thing for fun, but that he was getting a commission out of it?

A. I think he got a commission from the vessel. I do not know about it myself.

By Mr. WILSON :

Q. He never got any commission from you?

A. None.

559 By Mr. HAGNER :

Q. He was not there for fun?

A. That bill, you know, may have been for some provisions or a part for provisions and a part for commission. I don't know what it was for.

Q. What was the name of the master of your tug?

A. Kendrick.

Q. When did you buy the Minerva?

A. We bought her in the spring of 1892.

Q. Where?

A. We bought her in Baltimore.

Q. Did you direct Mr. Speaker on Saturday to breast the Tobin further out on that day?

A. I did not tell him positively as to just what to do. I told him that I wanted the captain to be satisfied that he was laying all right over Sunday.

Q. Why did you tell him?

A. Why did I tell who?

Q. Speaker.

A. Because he was there.

Q. How many men were working around that crusher?

A. Ordinarily, when we were loading a vessel, there might be twenty men around the machine and in the vessel.

Q. Where was Mr. Speaker when you told him that?

A. At the wharf. I met him as I came down.

Q. The engine-room is how far from where he was on the wharf?

A. Quite a distance. It is quite some little distance.

560 Q. Four hundred feet, is it not?

A. No; not four hundred feet.

Q. About how many hundred feet?

A. One hundred and fifty, I guess.

Q. Is it not more than that?

A. No; I don't think so.

Q. I am speaking of the engine that Mr. Speaker was in the habit of running. I do not mean the hoisting engine.

A. I understand what you mean. There is not very much difference; the hoister was just up above.

Q. Did your firm at that time, in August, 1893, lease the nearest lot and wharf to the east of the property described in the lease mentioned in this libel?

A. You mean next to the Potomac Stone Company's property?

Q. The lease mentioned in this libel is from the Potomac Stone Company to Charles G. Smith and Charles G. Smith, Jr.?

A. Yes.

Q. Not to the firm?

A. Yes.

Q. Did you lease the next wharf to the east of this property described in this lease, being Exhibit A with the label?

A. This apparently is the lease from the Potomac Stone Company for their property.

Q. To you?

A. Yes.

Q. To you and your father?

A. Yes.

561 Q. Now, I want to know if you leased the wharf next to this—the wharf next to this on the east?

A. Well, I might say, no; the Potomac Stone Company leased it.

Q. And you took it from them?

A. Yes; substantially.

Q. In other words, Mr. Smith, you took all of the Potomac Stone Company's property for a fixed *some* per year, did you not?

A. No.



Q. Say eight thousand dollars?

A. No.

Q. Didn't you?

A. No.

Q. Was not the consideration which you paid the Potomac Stone Company eight thousand dollars for all that they had around there that you used?

A. No.

Q. How was that?

A. There was one lease for the quarries and one lease for the wharf property.

Q. Then who leased the property on the east of the property described in that paper?

A. The Potomac Stone Company leased it.

Q. From whom?

A. From Gilbert.

Q. And Mr. Gilbert leased to the Potomac Stone Company, did he?

A. Yes, sir.

562 Q. Then you took an assignment of that lease, did you not?

A. I really don't know whether that lease has ever been assigned or not. We have been paying rent for it.

Q. To whom have you been paying rent?

A. To Gilbert.

Q. Did you not lease or rent the adjoining property on the east of that last wharf?

A. That is the Baker wharf?

Q. Yes.

A. Well, we did not lease it, but—

Q. You rented it?

A. We had some verbal agreement about it. We rented it from month to month. There was no lease and no paper signed.

Q. It was a monthly tenancy?

A. Yes; we paid rent for it.

Q. When does the Gilbert lease expire?

A. I think it expires in 1895.

Q. In June, 1895, is it not?

A. June, 1895, is my recollection of it.

Q. Did you rent all the property clear down to the Potomac boat-house or to that little house just west of the Potomac boat-house?

A. I believe there is a little strip in there that belonged to Waters that we did not use.

Q. Then, how many wharves were you occupying there in 1893 in addition to the wharf which is described in that lease marked Exhibit A?

563 A. The Gilbert wharf and the Baker wharf we were using at that time, I believe.

Q. Did you use any to the west of the property described in the lease?

A. Not directly to the west. I think we used the wharf that Mr.

Warder owned up above, called the Ray wharf. We used that at different times, but we never had any lease and never paid any rent for it.

Q. Have you ever blasted any rock there on the wharf described in Exhibit A with the libel?

A. What is Exhibit A?

Q. The lease for that wharf.

A. Blasted any rock there?

Q. Yes; broken up any rocks?

A. We might have sledged up some.

Q. Did you not blast some?

A. No.

Q. You never blasted any rock there on that wharf?

A. What do you mean by blasting?

Q. I mean by putting a little bit of powder in there, or nitro-glycerine, after the stones were hoisted up on the wharf to break them up there? Did you ever do that?

A. No; I have no recollection of ever doing it. It is possible that at one time when we had a few stone that we wished to shape up a little differently that we might have put in a pinch of powder in one or two of them just to open them. I do not even remember that, but it might have been done. If it was ever done, it was never done more than once, and I don't recollect of its ever having been done.

564 Q. It may have been done when you were not there?

A. No; it would not have been done without authority from me. We had no quarryman at the wharf.

Q. You did not keep any dynamite there at all?

A. No; we kept no dynamite nor powder there.

Q. Any nitro-glycérine?

A. No.

Q. There never was any kept in there at all?

A. There was none kept. Occasionally dynamite would stay out on the wharf or on the scow over night. For instance, if dynamite came to the place there by the Knox delivery wagon after the last scow had run up to the magazine in the quarry at night, we would be obliged to leave it on the wharf, or, rather, the usual custom was to put it on the scow; the scow that would go up in the morning. There was no storage of dynamite or anything else—any explosive.

Q. Under the small chute which projected out into the river it is shallow, is it not?

A. Under the small chutes?

Q. Yes; that project out into the river for the purpose of loading—this small chute from your elevator.

A. From the bins?

Q. These small chutes from the bins project out some?

A. Yes.

Q. Under them it is shallow, is it not?

A. Up next to the bins, more at the point where the stone is hoisted from the scow—right up under those bins there we have loaded vessels.

565 Q. These small chutes from the bins——

A. It is not so shallow under those chutes.

Q. From these smaller chutes, from these bins, the scows are loaded, are they not?

A. When we have scows to load with crushed stone; yes.

Q. Your object in putting these small chutes there was that while the large chute was in use for loading vessels that had been breasted out you could still load scows between the vessel and the crusher or wharf, while the other vessels were out there under the long chute. Was that the idea?

A. No; the small chutes were put there first.

Q. They were put there first?

A. Yes; we used to load vessels from these small chutes.

Q. And afterwards you ceased that and put the long chute in there?

A. Yes, sir.

Q. When was that long chute put in there?

A. The last of 1891, I guess, or the first of 1892, maybe.

Q. How did you come to put that long chute there?

A. When we loaded schooners under the short chutes we could not crush, and we lost time by having the schooner laying there, whereas with the long chute we were able to crush right along and load at the same time.

Q. In other words, you could load a scow from the short chutes while you were loading a vessel from the long chute. Is that it?

A. No; that is not the point, because we never loaded  
566 any scow with crushed stone while we were loading a vessel.

We could unload scows so as to keep the crusher running.

Q. The stone for the crusher was brought down the river on scows?

A. Yes.

Q. They were run in between the vessel and the wharf so that you could with your hoister take this unbroken stone from the scows, carry it up, and have it crushed and put down through the chute?

A. Deposited in the vessel; yes.

Q. Did you have any berths dredged out in front of any of these properties that your firm held on short rentals?

A. No; we did not have any berths dredged out. We had some dredging done in front of the Baker wharf at one time; not, however, to lay vessels.

Q. Do you remember that on Friday after seeing Captain Hankins in Mr. Lee's store and having this conversation of which you speak—do you remember coming down on the wharf afterwards and standing about the third or fourth pile there, east of the crusher, and talking to him?

A. No, sir.

Q. You have no recollection of that?

A. None whatever.

Q. You do not mean to say you did not do it, do you?

A. I think I would have been likely to have recollected it if I had talked to Captain Hawkins.

Q. But you do not recollect it?

A. I do not.

567 Q. You said yesterday in your examination that Mr. Lee stepped up and said that the berth had been dredged out to a certain depth. Did you say anything to Captain Hawkins with respect to that remark of Mr. Lee's? Did you contradict it or did you confirm it at all or what?

A. I do not think I said anything in regard to it.

Q. You did not say anything?

A. No; I think not. That seemed to be sufficient.

Q. It suited you. Did you tell Captain Hawkins at any time to sound inside of his vessel and near about the third or fourth piling?

A. No; I never said anything about any piling.

Q. Did you tell him to sound inside of his vessel because some stone might have dropped off the lighters?

A. I may have told him that there might have been some small stone in there.

Q. When did you tell him that?

A. If I told him at all it was when we were in Lee's store. I told him to sound. I do not recollect anything particularly about it. I might have told him that some small stone would have been likely to have dropped in there, as we were handling stone on the wharf all the time.

Q. You certainly never told him that there was any obstruction in the middle of that berth, did you?

A. No.

Q. Did you tell him that there was a pole there that he could breast off with?

A. I think I have answered that question about the pole to the best of my knowledge. I do not remember saying anything  
568 to him about a pole.

Q. Did you tell him that Mr. Speaker would help him to breast off?

A. I told him Mr. Speaker would do anything he wanted him to do and that I would tell him to.

Q. When you answered the libel in this case you used the following words: "On Friday, the 4th day of August, 1893, the said schooner being then partly loaded, one of these respondents, Charles G. Smith, Jr., said to said master that it would be wise for him to sound around his vessel, to make sure that he was lying all right."

Is that correct?

A. Yes, sir.

Q. You said on the same page, page 6 of your answer: "The respondents, by their foreman, there at that time advised and urged the said master to shove said schooner off at high tide."

Is that correct?

A. There and then—when?

Q. You say on page 6 of your answer as follows: "The loading

of said schooner proceeded under the directions of said master until about five o'clock on Saturday afternoon, August the 5th, at which time, the tide being nearly low, the master said he was touching bottom slightly, and thereupon the work of loading ceased and was not resumed until the master said that he was laying all right and that he would shove his vessel off on high-water tide, it being high tide about midnight."

Is that correct?

569 You swore to this libel?

A. I swore to it as to what I knew of my own knowledge and as to what I believed from the information received from others. As I have stated, I was not in town at five o'clock on Saturday evening.

Q. You say in this libel: "The respondents, by their foreman, there and at that time advised and urged said master to shove said schooner off at high tide."

Is that correct?

A. To the best of my knowledge and belief it is.

Q. To whom did you have reference when you were speaking there of "the respondents, by their foreman"? Who was that foreman?

A. I presume Mr. Speaker was the person meant.

Q. There is no doubt about that, is there?

A. I do not know that there is in my mind. I do not think there is.

Q. Did you tell Captain Hankins that if he breasted off with the pole, so that the inside of the schooner was clear of the stone that might have fallen off the lighter, the schooner would be safe?

A. I have already stated that I have no recollection of saying anything to Captain Hawkins as to poles.

Q. Did you tell him that if he kept off from the inside close to the wharf there, just east of the elevator and crusher, as you call it, so as to keep clear of any stones that might have fallen off the lighter, that the schooner would be safe?

570 A. No; I never told him what he would have to do to make the schooner safe. I supposed that he would know that himself. I told him that we would do what he wanted done, if anything.

Q. How often did you go down on Friday to the dock where Mr. Speaker was loading stone?

A. I do not remember.

Q. Do you know that you went there more than once?

A. As I said, I do not remember how many times I was there; whether it was once or more than once.

Q. You may have gone several times that day?

A. Yes; I may have gone.

Q. And you may have been standing there at that fourth piling?

A. I might have been standing all over the wharf. I am out there every day.

Q. And you may have spoken to Captain Hankins with respect to the depth of the water when you were standing there?

A. Well, I generally knew what I said when I had any conversation about a matter of any importance.

Q. You might have said that to him there; might not you?

A. No; I do not think so.

Q. You do not think so?

A. No.

Q. You have no recollection of it?

A. No.

Q. When were you on the dock last that you remember prior to the sinking of the Tobin?

571 A. The last time was before nine o'clock on Saturday morning. That I remember and that I know was the last time.

Q. What time prior to that had you been on the wharf last?

A. I suppose at six o'clock on Saturday morning, when I came down.

Q. At what time prior to that?

A. That goes back into Friday, you know, where I said I do not remember. I might not have been on the wharf all the afternoon.

Q. All Friday afternoon?

A. I might not have been. I am generally in the office in the afternoon.

Q. But you might have been?

A. I might have walked out there; it is but a short walk.

Q. The captain swears that you did and you do not remember. What were the several widths of the scows which you employed there?

A. I would not like to state as to that without making some measurements. We have the same scows now that we had then.

Q. There were scows there of different sizes, however?

A. They do not vary much. There was one scow that was narrower than the average and one scow that was wider than the average. With the exception of those two, they ran pretty nearly the same.

572 Q. About how many were there?

A. About sixteen.

Q. Can you tell the narrowest of them that you now remember?

A. I know the number of the narrowest scow, but as to the width I would not like to state, because I do not know.

Q. What was the number of the narrowest scow?

A. No. 2.

Q. Scow No. 2 was the narrowest that you had?

A. Yes, sir.

Q. Do you remember the number of the broadest scow that you had?

A. No. 3.

Q. Will you be kind enough to make the measurement and let us know?

A. Yes; the scows are there and I can measure them or you can measure them. Anybody can testify as to that. The captain of the tug knows all about those scows. The scows are all there, and they are just the same scows that we had then; we have not changed them at all.

Q. On the top of page 17 of your testimony you say, in speaking of Mr. Lord:

"Q. He began work some time in October?

A. Yes; that is my recollection.

Q. He continued how long?

A. I guess about a day or a day and a half, maybe.

Q. What then happened?

A. He stopped."

Do you not know that the stone was all out of the vessel by the first day of November?

A. I had not looked into that matter of dates. I have got  
573 that so that I can testify to it.

Q. Don't you know, or do you know, that Mr. Lord tried under his first contract, which has been shown here, to get that stone out for nearly a week; that his pump broke down, and that he finally threw up that first contract after getting out in the neighborhood of one hundred tons? Do you know that?

A. I know that he commenced; I know that it did not work; I know that he got out about fifty tons, and I know that he stopped, but certainly it is not my recollection that he worked constantly for a week to get out that fifty tons. I think he worked altogether about a day, and I am quite sure of it. He was fooling there for some few days, but I do not think for a week.

Q. Or nearly a week?

A. I do not say that; I do not know. I know he did not do any work to amount to anything.

Q. Do you not know that it was after her sale at public auction that Mr. Lord began to pump out the water for the purpose of raising the vessel?

A. I believe that is true; yes.

Q. Then nearly a month, or more than three weeks, of pumping was done for the purpose of getting out the stone. Don't you know that?

A. No.

Q. You do not?

A. No.

Q. Do you not know that Mr. Lord did very nearly three  
574 weeks of pumping in order to get that stone out of there?

A. Do you mean after he came back the second time?

Q. Yes, sir; after he came back the second time.

A. No; that is not my recollection.

Q. Isn't it?

A. No.

Q. Mr. Lord has sworn to it.

A. That may be true. I wouldn't say it was not, but I don't



recollect exactly as to these dates. I took memoranda of most of that work, but I have not refreshed my memory any by them.

Q. Then you are not speaking positively, and you do not mean to be positive?

A. As to what?

Q. You do not mean to say positively that Mr. Lord only took a day or a day and a half to get that stone out of there?

A. I did not state that.

Q. Didn't you?

A. No.

Q. Just state where that is wrong (handing his testimony-in-chief to the witness).

A. It is all straight what you read there.

Q. You are mistaken about that, are you not?

A. Yes.

Q. You are mistaken, then, in stating that the next work done in the effort to raise her or get out the cargo was not done until the last of November; you are mistaken in that?

575 A. As to the effort?

Q. As to the effort to get out her cargo.

A. Her cargo was gotten out some little time before that. I do not remember just the date.

Q. Do you not remember that her cargo was gotten out by the 1st of November?

A. No.

Q. Do you not know that the sale occurred on the 14th of November?

A. I have a memorandum of it, but I do not remember that date.

Q. Do you not know that it occurred on that date?

A. No, sir; I do not remember the 14th of November in connection with the sale. I remember that she was pumped out, and I remember distinctly that it was on the 23rd day of November.

Q. Do you not know that there was a ten days' advertisement of that schooner before she was sold?

A. I presume I know it, but I do not recollect exactly as to these things.

Q. Then what you have testified to here you did not mean to be absolutely the fact, but simply your recollection of it. Is that the idea?

A. In one respect it seems to be wrong—that is, my testimony there would seem to say that you only tried once to get the stone out, whereas, as it seems, you tried twice, the first time unsuccessfully, and the second time you did get the stone out, and the third time you pumped the water out.

576 Q. Then you know that it took nearly three weeks to get that stone out when Mr. Lord began the second time?

A. No, sir; I do not know that.

Q. You don't know that?

A. No, sir.

Q. You do not know that it did not? Mr. Lord has testified that it did. You do not know that it did not? Because if you do, I want you to say so.

A. I don't know that it did not. I don't know that it did not and I don't know that it did. That is not my recollection, but that is contrary to my recollection of it.

Q. Did you, on the Saturday before going away, ask Mr. Speaker how the vessel was lying, and whether she was lying all right or not, and that he replied that she was?

A. No.

Q. On Saturday, did Mr. Speaker say to you that the vessel was lying all right?

A. I don't know. I cannot say.

Q. You do not recollect?

A. No; I do not recollect now at this time as to that conversation—not at this minute, I don't.

Q. You will not say that Mr. Speaker did not tell you that the vessel was lying all right, will you?

A. No.

Q. You certainly won't?

A. No; I won't say that he told me—

577 Q. Will you be kind enough to tell us whether or not, in this conversation which you speak of, which occurred between you and Captain Burnett and Mr. Endicott in respect to that proposed settlement or payment on your part—will you state exactly the position of you three gentlemen when that conversation occurred? First, where were you?

A. We were in Mr. Lee's office.

Q. In the office in his store.

A. In the office of his store; yes, sir.

Q. Is it not a fact that you were sitting just opposite the door of his office, up against the door; that Captain Burnett was on one side of you, and that Mr. Endicott was on the other side of you? Is that so?

A. I do not remember as to the placing of the people around the room.

Q. Do you or do you not remember whether there was no separation whatever for the purpose of private talk between Mr. Endicott and Captain Burnett, but that Captain Burnett remarked that he would be willing to discount it fifty per cent.—meaning five thousand dollars; that then Mr. Endicott spoke up and said, "You have made a better offer than I would be willing to make, but since you have made it I will let it stand." Do you remember that occurring exactly as I have mentioned?

A. No.

Q. You do not?

A. I do not think they withdrew to talk it over. My recollection now is, since you speak of it, that Mr. Burnett or Mr. Endicott said, "Shall I state what we have been talking over?" or "Shall  
578 I state what he thought of?" The other, whichever it was, said, "Yes." I think there was no private conversation at that time.

Q. Do you remember one or the other stating, when the offer was made, "That is better than I would have done"?

A. No, sir; I understood that it was agreed between them. I do not recollect anything of that kind. I think the matter was arranged beforehand, and that they so stated right there before me—that is, that one of them asked the other if he should state what they had been talking about, and that they then stated it, and that they both agreed as to the amount. I do not remember any expression of a nature to contradict that.

Q. Since your testimony yesterday you have refreshed your memory?

A. I have not refreshed my memory.

Q. You now think you are mistaken as to their withdrawing?

A. Yes; I think so; I think it was all done there.

Q. You were in Alexandria examining the Tobin, you said, after she had been taken back upon the ways, subsequent to her being put overboard for the purpose of allowing something else to occupy the ways. I think that was what you said.

A. Yes, sir; I think so.

Q. At that time, you said, she had some red lead in her seams?

A. Yes, sir.

Q. You took a sharp instrument, an awl or something of that sort, and shoved it in on the nail heads. Is that right?

579 A. There were no nail heads there at the place where I shoved it in.

Q. You took an awl or—what was the sharp instrument that you took?

A. It was a sort of an awl—a blunt awl. It was not meant for an awl.

Q. How long was it?

A. I don't know. It was long enough to run up through the timbers.

Q. When you say the timbers do you mean the planking?

A. Yes; the planking.

Q. Through the planking and not the timbers?

A. Of course, not the timbers.

Q. The timbers are the ribs?

A. Yes, sir.

Q. You did not mean that it ran up through the ribs?

A. I do not know how far it ran, but it ran until it got through. It apparently went through the planking.

Q. Give me an idea how long that instrument was.

A. I suppose it might have been six inches long.

Q. Do you know that in the construction of the Ellen Tobin under the water, in deep water, copper nails were used entirely?

A. I know that there were no copper nails in the place where I ran the awl.

Q. Do you know, or not, whether in deep water copper nails were used entirely?

A. I did not see her built and I did not make any examination for copper nails.

580 Q. It was up near what sailors call "white water" or near the surface of the water that you inserted this awl, was it not?

A. No, sir; it was not

Q. Where was it?

A. It was well down.

Q. How far down?

A. It was, probably, below her "marked light."

Q. What does that mean?

A. That is where she would sit in the water if she did not have any cargo in her. It was well down, and there were several places; it was not only one place.

Q. Was she not all covered over with mud from lying in Georgetown harbor?

A. No, sir; she was not.

Q. When you saw her?

A. She was not.

Q. Was it at her bow or at her stern that you inserted this instrument?

A. In one case it was up towards the bow and in another case, I think, it was a little further back than the first one.

Q. How much farther back?

A. Ten or fifteen feet, but both forward of her amidships.

Q. Was there a man standing by you who asked you what you were doing when you inserted that awl in there?

A. No; there was nobody around there except our own men.

581 Q. There was not?

A. No; but Mr. Berry—I called him to see it, and he saw it.

Q. Was there not another man there—not Mr. Berry—who asked you what you were doing in putting that awl in there?

A. No, sir.

Q. You do not remember that?

A. No, sir.

Q. You do not?

A. No, sir.

Q. You do not remember that circumstance?

A. No, sir.

Q. You do not remember the circumstance of another man asking you what you were putting that awl in there for?

A. No, sir.

Q. You are sure that nobody did?

A. Yes, sir.

Q. You are just as certain about that as you are about anything else you have testified to? There is no doubt about it in the world?

A. I said that I believed it, and I do not know that I can say anything more than that.

Q. Do you know that in the construction of the Ellen Tobin below water only copper nails or copper spikes were used?

A. I don't know how I should know as to that.

Q. You don't know about that?

582 A. No; but I know this: that I found a plank that had been taken out of her that had an iron nail in it. One had

a whole iron nail in it. There were several of them laying back there, planks that had been cut out, and the nails were iron.

Q. What time in the spring was it that you were down there?

A. I cannot tell you that. I do not remember as to just exactly the date. I took a memorandum of it after I came back, and I have got it, but I have not looked it up. I cannot say now.

Q. Do you know that that vessel had been up there for months prior to that time?

A. I know that it had not been up there for months.

Q. Do you know that it had not?

A. Yes.

Q. Do you not know that it was taken down to Alexandria in November?

A. No, sir; it was not.

Q. It was not?

A. It laid across the river for some little time before it was taken to Alexandria.

Q. How long?

A. I do not know exactly how long, but my recollection is that it was some time after it was raised, and it was not raised until the 23rd of November.

Q. Do you not know that it was taken down to Alexandria and put on the ways some time in January?

A. That would be more than a few days.

583 Q. I am getting at what you know about it. I want to find out about it.

A. I do not know just exactly when that vessel was taken to Alexandria. I did not see the vessel again after she went around the point. She first lay across the river and then she lay around the point; but she certainly did not go to Alexandria in a few days.

Q. She lay over at Analostan island, did she not?

A. She lay around the point there towards Analostan island—below Analostan island.

Q. You saw her subsequently sunk down opposite the flat or opposite the observatory, did you not?

A. No; I don't know that I saw her there. The only recollection that I have of seeing her after she left the flats across the river was down below Analostan island.

Q. On which side of the river?

A. On the right-hand side, going down.

Q. Do you not know that she lay sunk there for some time just off the sea wall that you built yourself?

A. I don't know just where she lay.

Q. Do you not remember her lying off the sea wall there for some time?

A. No.

Q. The sea wall that you constructed?

A. I knew that she lay down there somewhere, but I do not know just where.

Q. That was the second time, that time she laid off the sea wall?

584 A. I don't know that she laid in but one place.

Q. You knew that she was laying off opposite Georgetown, near Analostan island?

A. She was taken over there after she was raised.

Q. Immediately after she was raised?

A. Yes.

Q. And sunk there?

A. Yes.

Q. Then she was taken below, near the sewer mouth?

A. Yes; I believe she was down in there somewhere.

Q. Then she was taken to Alexandria and lay half sunk over at the upper part of Alexandria. Is not that so, or do you know about that?

A. No; I don't know about that.

Q. Do you know whether it was in January that she was put on the ways in Alexandria?

A. No, sir; I do not.

Q. You do not know about that?

A. No.

Q. You do not know that it was not?

A. No.

Q. You do not know anything about how long she was on the ways before this red lead was put on her for the purpose of putting her overboard that they might use the railway?

A. No, sir. I was not in Alexandria.

Q. If the other witnesses testified that she lay there for several months before you saw her, you would be disposed to believe that that was so, would you not? You have no recollection to the opposite of that?

585 A. I have only my belief as to whether it is so or not, and that has no bearing on this case.

Q. You have no recollection to the contrary of that, that she was for several months before you saw her in Alexandria; there is nothing in your recollection that is to the opposite of that proposition, that she was up on the ways for several months in Alexandria before you saw her?

A. I know that she had been put on the ways before I saw her myself. I know that she had been put on the ways and been put back into the water and taken up on the ways again; but the time between these movings I don't know.

Q. That is not what I want to know. I want to know if it was a fact that these other witnesses testified that that schooner was up on those ways for several months, whether that would be antagonistic to what you recollect about it, and whether you have any recollection to the contrary, or do you know to the contrary?

A. I don't think it was several months.

Q. That is only a matter of opinion and not a matter of knowledge.

A. As I say, I am doing the best I can to answer these questions,

but I have not looked it up. I have memoranda about most of these things.

Q. You should have looked up your memoranda.

A. I don't know why.

Q. On page 4 of your testimony Mr. Wilson asked you this question:

586 "Prior to meeting the captain at Mr. Lee's store what, if any, conversation, agreement, or contract had you made with him relative to loading at your wharf with stone?"

You say:

"None whatever."

Is that right?

A. Yes.

Q. That is right. Now, in the answer to the libel you say that you had entered into a contract with the captain of the vessel on the 2nd day of August. Is that right?

A. I never entered into any contract with the captain. I never saw the captain before in my life.

Q. You mean by that your personal contract. You do not mean to say that you did not make a contract with the captain through Mr. Lee, do you?

A. Yes.

Q. You do say you did not make a contract?

A. Yes.

Q. Then why did you say in your answer that you did?

A. I say that we did not make any with him or with anybody.

Q. Why did you swear that you did?

A. I do not recollect as to just what that point is.

Q. I would like to have it explained, if you can explain it.

Mr. WILSON: It is not competent for the witness to explain. If there is any inconsistency in his statement, you can comment on it, but I submit that you need not spend any more time on that point.

587 The WITNESS: That is correct. I never saw the captain and never had any charter about it.

Q. You can make any number of contracts with a man without seeing him.

A. I don't know how, without having some papers passed.

Q. That is all you mean, then?

A. What is all I mean?

Q. That no papers passed.

A. I don't say so.

Q. Do you say so now?

A. Say what? That no papers passed?

Q. That what you mean by saying that you made no contract with him is that no papers passed.

A. No; I don't say that at all.

Q. What do you mean when you say you did not make a contract with him?

A. I mean that there was no contract with him, verbally or in



any other way, made by our firm or through their authority—just that.

Q. That is your signature, is it not (exhibiting signature to witness. See cross-libel)?

A. Yes.

Q. You swore to that paper?

A. Yes.

Q. In that paper, in the third paragraph, you say this:

“On the second day of August, 1893, the said schooner then being at the port of Georgetown, District of Columbia, then leased and in the possession of the libellants, and being commanded by one John Haskins, master, an oral agreement was made by and between the libellants and the said master, acting on behalf of the owners of said schooner, whereby the said master agreed to receive at  
588 their said wharf and to convey from said port of Georgetown to Fort Monroe, Virginia, a cargo of crushed stone at and for the compensation of fifty cents per ton.”

Why do you swear to that?

A. That is not exactly right.

Q. Now what do you say?

A. Now I say that I did not have any oral agreement with him, as I have stated now four times.

Q. I just want to know what you say. You deny that you did have any agreement?

A. I do.

Q. Either by yourself or through another?

A. I do.

Q. What scow was it that lay, on Saturday, the 5th day of August, between the wharf and the Ellen Tobin?

A. I cannot tell you.

Q. Was there room enough between the wharf and the Ellen Tobin to allow the broadest scow that you had to lay there?

A. I should think so.

Redirect examination.

By Mr. WILSON:

Q. Mr. Hagner has questioned you about a memorandum of yours which he saw in the possession of Mr. Barnard. Will you state if, at or about the time of the injury to the Tobin, you made a memorandum of the occurrences that attended and preceded that injury?

A. Yes, sir; I did make such a memorandum.

Q. And you gave it to Mr. Barnard?

589 A. Yes, sir.

Q. Is this the paper which I now show you (exhibiting paper to witness)?

A. Yes, sir; that is the paper.

Q. Have you any objection to that paper being filed and introduced in evidence in this case as your statement, made at the time, of your recollection and understanding of the occurrences to which it relates?

A. No, sir; I should think not.

Mr. WILSON: I will offer this paper in evidence.

Mr. HAGNER: I object to it on the ground that, as the witness was not in Washington at that time, he could not possibly have made a memorandum of the occurrences that happened in Washington or in Georgetown then, and that it could not be contemporaneous if it was.

The above-mentioned paper, consisting of nine pages, is filed herewith and marked Exhibit C. G. S. No. 8.

Q. You have stated the facts relating to the arrival of the Tobin at your wharf and the loading of her and the circumstances under which the loading was begun as you recollect them, have you not?

A. Yes; I think so.

Q. The vessel arrived there and began to load without any special or distinct arrangement or agreement with the captain or owners of the vessel?

A. On our part; yes.

Mr. HAGNER: I object to that because the answer and 590 cross-libel say exactly the reverse.

Q. Will you state more distinctly what the arrangement and understanding was between yourself and Mr. Lee in regard to the procurement and loading of vessels, whether it was that any and all vessels might come and load at your wharf with stone at the rate of fifty cents a ton without any other or further agreement, you paying at the rate of fifty cents per ton?

Mr. HAGNER: I object to that as immaterial, for the reason that if Mr. Smith keeps a wharf for the purpose of accommodating vessels in the transportation of his material it is entirely immaterial what he may have said to Mr. Lee, and the law says that it is his business to know what obstructions, if any, were in his dock or berth, and therefore it is not for him to state anything which indicates that he did not know.

A. There was no distinct arrangement made with Mr. Lee in regard to procuring vessels. Mr. Lee knew that we had the stone to ship and Mr. Lee had vessels usually that applied to him for work, and if by any reason we were delayed or the engineer department ordered us to stop shipping we would let Mr. Lee know and Mr. Lee would stop his vessels, but he kept himself informed as to our needs in the way of vessels and we loaded the vessels that he sent there.

Q. Those are the facts about it, and the legal relation that you sustain to the vessel you do not attempt to testify about?

A. No, sir.

CHARLES G. SMITH, JR.,  
By E. L. WHITE, *Sp'l Comm'r.*

591 The further taking of these depositions was thereupon adjourned until Monday, November 19th, 1894, at three o'clock p. m.

E. L. WHITE,  
*Notary Public, District of Columbia.*

592 WASHINGTON, D. C., November 19th, 1894—3 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the libellant, Mr. Hagner.

Present on behalf of the libellees, Mr. Wilson and Mr. Barnard.

Whereupon WILLIAM SPEAKER, a witness of lawful age, called by and on behalf of the libellees, having been first duly sworn, is examined—

By Mr. WILSON:

Q. Will you state your name, age, residence, and occupation?

A. My name is William Speaker. I am forty-six years of age. My residence is No. 1427 34th street. I am an engineer.

Q. Where are you now employed?

A. I am employed with Charles G. Smith & Son.

Q. How long have you been in their employ?

A. I have been in their employ now for, I think it is, going on five years.

Q. Are you an engineer by profession?

A. Yes, sir.

Q. Have you an engineer's license?

A. Yes, sir.

Q. State in what capacity you were employed by Messrs. Smith & Son in August of 1893—a year ago last August.

593 A. I was employed as an engineer.

Q. What were your duties?

A. My duty was to look after the engine. I had two engines there. There were two other engineers, but I was the chief engineer. The other engineers did not have anything to do with the large plant. All they had to do was with the hoister.

Q. You had the direction of the hoisting and crushing apparatus?

A. Yes, sir.

Q. Who were your assistants?

A. I had really no assistants. I had two engineers there, and sometimes one of them would have the manipulating of the hoisting engine and sometimes the other would. Mr. Godfrey was there most of the time.

Q. What was his business?

A. His business was to manipulate the hoister.

Q. Do you remember the arrival at the wharf of the schooner Ellen Tobin in August, 1893?

A. I recollect of her coming there, but just the day and the time I would not be positive about. She came there on Wednesday in August, the fourth or fifth of the month. It was on Wednesday,

but whether she took her berth on Wednesday evening or Thursday morning I would not be positive. I think it was Wednesday evening that she taken her berth, but I did not discharge any stone into her until Thursday morning.

Q. When did you begin to discharge stone into her?

A. Thursday morning was the first I put in her.

594 Q. What, if any, directions did you give to the captain as to where to go or what he could do with the schooner on her arrival?

A. I told him where to take his berth and asked him which hatch he wanted us to commence discharging stone into, and he told me, and then I showed him what position to put the vessel in so the chute would discharge into the hatch that he designated.

Q. Did you assist in making her fast or did you direct her being made fast when she arrived at the wharf?

A. Some of the men there on the wharf, I think, assisted, which they always do when they come to the wharf. They cast their line and we take their lines and fasten them to the wharf that they want them made fast to.

Q. What, if any, statement was made by you to the captain about the depth of water at the wharf?

A. Any statement direct to the captain?

Q. Yes.

A. I never gave the captain any statement about the depth of the water there. I don't think we ever had any talk at all about the depth of the water until on Friday.

Q. I mean at the time she came to the wharf and made fast?

A. At the time she came there?

Q. Yes.

A. I didn't have any statement at all to make about the depth of the water then, and I don't think the captain said anything to me about the depth of the water at that time—not until after we were loading.

595 Q. State when the first mention was made by the captain about the depth of the water in the berth.

A. I think, to the best of my recollection, it was on Friday.

Q. At what time?

A. I think it was on Friday during the afternoon. I would not be positive whether it was the afternoon or morning, but I know it was on Friday, and I think it was in the evening. My recollection is it was in the afternoon, after they had hauled the vessel.

Q. You began loading Thursday morning, you continued loading on Thursday and on Friday, and into which hatch were you loading?

A. We were loading into the after-hatch.

Q. How long did you continue loading in the after-hatch?

A. To the best of my recollection I think it was between four and five o'clock; probably it might have been five o'clock on Friday.

Q. On Friday?

A. Yes, sir.

Q. Then you hauled the vessel?

A. Yes, sir.

Q. And put the forward hatch under the chute?

A. Under the chute; yes, sir.

Q. And began to load there?

A. I think we ran probably three-quarters of an hour or an hour, or probably not that much of the evening.

596 Q. Putting crushed stone into the forward hatch?

A. Into the forward hatch; yes, sir.

Q. How much stone, approximately, did you load into the after-hatch?

A. Probably I put in between two hundred and fifty or three hundred tons—probably three hundred tons.

Q. State what conversation you had with the captain on Friday afternoon, after you had changed the vessel, concerning the depth of the water.

A. Well, after we shifted the vessel Friday afternoon the captain made his soundings. When he cast his lead I told him that the water was, I thought, a little shallow out in front of the derrick there where we had been hoisting stone. The vessel then was letting in. I do not suppose she was more than eighteen or twenty feet from the wharf at the time of that first shift. I had a pole laying on the wharf, and then we put that pole on and shoved her out. He got his soundings again, and further out we got better water. He found fourteen, fifteen, or sixteen feet of water there.

Q. Where was that?

A. That was at the stern. I think he made three or four soundings there. He made one sounding, I know, from the stern, so he said that was all right. She laid there then until Friday morning. That is the only soundings that I seen him make.

Q. When was this conversation?

A. This was on Friday—Friday evening.

Q. On Friday evening?

597 A. Yes, sir.

Q. You said she laid there until Friday morning. You mean Saturday morning?

A. Saturday morning.

Q. When this conversation occurred, state as nearly as you can how the vessel was lying with respect to the wharf. Was there a scow between her and the wharf?

A. Yes, sir; there was one scow between her and the wharf—that is, the scow was up forward.

Q. She laid outside of the scow. Was the scow close to the wharf?

A. Yes, sir; the scow was close to the wharf.

Q. How near was the vessel to the scow?

A. Well, at the forward end I suppose the vessel was up against the scow at the forward end. At the after end it was probably five or six feet away from the scow.

Q. What kept her out five or six feet?

A. This pole that we had.

Q. When was the pole put on and what was it for?

A. The pole was put on there on Friday to keep her from coming in.

Q. Friday morning?

A. No, sir; Friday afternoon. It was put on there to keep her from coming in when this scow was not sufficient to keep her out there, after the soundings, where he made the shallow sounding.

Q. How long was the pole?

A. Really, I couldn't say.

598 Q. About how long?

A. I never measured it, but I think the pole was between forty-five and fifty feet.

Q. How was it fastened to the wharf and to the vessel?

A. It was lashed to the wharf. It was set on the end of the wharf, and it was lashed to a piling, and the other end was fast with a block and tackle.

Q. So that she could be moved in and out?

A. She could be moved out, but you could not move it in with the pole; you could move it out. One end of the tackle was fastened to the end of the pole and the other end to the schooner.

Q. Did you resume work on Saturday morning?

A. Yes, sir.

Q. And kept it up during the day?

A. And kept it up during the day; yes, sir.

Q. During the day what, if any, conversation did you have with the captain about moving the vessel out and as to her position there?

A. During the day we talked of moving her out, and we talked about finishing the work by wheelbarrows. We were talking about getting along so nicely that we thought we could finish it on Monday; finish his cargo. Then we talked about getting another scow in there to lay over Sunday.

Q. What was said about getting another pole. and when was the first mention made of another pole?

A. That, I think, was mentioned on Friday. On Friday we talked of getting another pole to be used on Monday. The  
599 idea of the other pole was that we had already had one pole on that we put up on Friday evening or Friday afternoon, and the other pole was to be put on the forward end, and then after we had taken the scow out we had to get in there with a second—to put two scows in between the vessel; and the idea was to keep these two poles to breast her off with and take the other scow out; to have two poles to breast off and let her come in as close as she would, as close as the chute would discharge into the first hatch.

Q. That was on Friday afternoon?

A. On Friday afternoon we talked of the pole.

Q. As to getting another pole?

A. Yes, sir.

Q. The object of having two poles was to keep the vessel off in deep water after you took the second scow out?

A. Yes, sir.

Q. And to let her come in again to load?

A. To let her come in as close as the chute would admit, so close that the chute would discharge into the vessel.

Q. Do you remember what was the reach of the iron on the chute?

A. Of the iron on it?

Q. Yes; about what?

A. I suppose seventy feet, but I would not be positive about it.

Q. I mean the length of the chute. How long was the chute?

A. From the beginning—well, I never measured it.

Q. You are speaking of the point from where it left—

600 A. Left the screen?

Q. Yes.

A. From the beginning to end?

Q. About how long was it?

A. I can't tell exactly.

Q. You can measure it. You need not answer that question now.

A. I think it is fifty-five feet. The chute, I think, is thirty-three to thirty-five feet, the wood part of it. If I am not mistaken the iron chute is eighteen or twenty feet.

Q. What was said on Thursday about the use of wheelbarrows in loading?

A. Well, we talked of using wheelbarrows if the poles would not admit us to come close enough.

Q. If you could not get the vessel close enough to the wharf?

A. That we would use wheelbarrows. That was the idea of the poles.

Q. What, if any, action did you take about getting another pole?

A. Mr. Smith sent an order up to one of his foremen to have a pole brought down on Saturday.

Q. To your knowledge, do you know of that order?

A. Yes, sir; I know of the order. I didn't see the order, only he told me that he ordered it.

Mr. HAGNER: I object to what Mr. Smith told him.

Q. Have you any knowledge of such an order having been given?

601 A. The order must have been given. We got the pole, anyhow.

Q. You got the pole?

A. The pole came.

Q. It came the next day?

A. It came the next day—Saturday.

Q. When did the pole arrive?

A. The pole came down Saturday evening.

Q. State if you kept on loading on Saturday and when you stopped.

A. I stopped loading on Saturday about fifteen or twenty minutes of five o'clock.



Q. State how you came to stop and the conversation you had with the captain.

A. The captain came onto the wharf and I was out there. I believe he was out on the wharf when I went out on the wharf. He was standing at the bow of the vessel—standing forward there under the hoister. The captain says to me, he says, "I believe I am ebbing out a little bit." It was then about low tide.

Q. State right there what you mean by "ebbing out."

A. I don't know what he meant by ebbing out—that we were discharging stone in there, and that he was not going down any more. I suppose that is what he meant by "ebbing out." I told him that if that was the case we would stop work. He said that he did not want to get her down by the head, because he was making a little water, and he did not want to get away from the pumps.

602 He said that if we continued on he believed she was ebbing out; that if we continued to discharge stone in there he would get her too far by the head and she would make a little water, and he did not want to get her away from the pump. I told him in that case I would stop the machine and not put any more in, which I did. I gave the signal to them to stop the machine and the machine stopped. After the machine stopped, it being Saturday night, the men all took out for their money, and so after the men got away he and I were standing on the wharf alone, and he says to me, "What am I going to do about this iron chute up here?" He says, "I want to haul on high water, and you have not told me what scow I shall use." I pointed to him and I says, "Here is the scow, lying right ahead there; take that scow lying right ahead of you; that is the most convenient." He said he wanted to haul on high water, and I told him to use that scow. So I went out then, and to have it all straight I called some of the men—a number of them—back to take the iron chute down, and they laid it on the schooner.

Q. Who were the men who helped to take the chute down and put it on the schooner?

A. I don't know; there were some. I think, if I ain't mistaken, there were five or six of them there, but I don't know just who they were. I know one or two of them. I know two of them positive, and three of them, I think. One of the men was not working there, but he had been working there. He helped to take it down. There were two colored men there—one named William Burton, and the other, John Taylor.

Q. Were you on the schooner yourself?

603 A. I was on the schooner at the chute when it was taken down. It was put on the schooner.

Q. Will you state if, while you were on the schooner, the pole arrived, and what, if anything, was said about it?

A. I was on the wharf when the pole came.

Q. That was just before the chute was taken down?

A. That was before the chute was taken down.

Q. Where was the pole, and what was done with it?

A. The pole was lying on a load of stone on top of the boat that

was just rounding to to come to the wharf, and I called the captain's attention to it. I said, "Well, Captain, I see the captain of the tug-boat has got our pole all right for us." He said, "Yes; we will be all right now."

Q. Then what was done with the pole?

A. That pole was taken onto the wharf there, but I don't know what became of it afterwards.

Q. It was taken off and put on the wharf?

A. Not that evening. The pole, I think, laid on the scow there for a day or two.

Q. Where was the scow that you pointed to and said that that could be put in?

A. Laying right directly in front of him—right forward of him. I had one scow laying right in the berth.

Q. What did you say about using her that night?

A. He said he was going to haul on high water, and that is why he asked me to take the iron chute down and detach it there over Friday, because it ran up through his rigging and interfered  
604 with his hauling. He asked me to take it down so that he could haul on high water. He didn't say what high water, but he said he wanted to haul on high water.

Q. How was the tide at that time—at five o'clock that afternoon?

A. At five o'clock it was low. If I ain't mistaken, the tide was about at its lowest at five o'clock in the evening.

Q. Did he say what use he was going to make of the pole?

A. No, sir; only what he and I talked together about using two poles the day before; that on Monday, after we taken the second scow out, we would use the pole, and then let her come in as close as would admit the chute to discharge into the vessel.

Q. State what was said about the reason for putting in another scow.

A. He thought that he could not get a full cargo there, and I wanted him to make his soundings, although he said he found plenty of water every sounding he made there. He said there was plenty of water. Saturday evening, though, when he said he was ebbing out he thought he was caught onto something.

Q. What did you have to do with loading the vessel after the stone was put on board?

A. On board the vessel?

Q. Yes; the disposing of the stone and trimming the vessel.

A. I didn't have anything to do with that, only to see that the men were in there doing their work. The men that we had  
605 in there trimmed the stone at his directions—where he wanted it trimmed.

Q. Who gave directions as to how much stone was to be put on board and where it was to be placed when it got on board?

A. The captain gave directions where it should be placed.

Q. Who was there on behalf of the vessel directing and superintending the placing of the stone?

A. The mate was there the greater part of the time.

Q. Until what time?

A. I think the mate left there—he was there on Thursday and Friday—I think the mate left there on Saturday morning; I know he left some time during Saturday forenoon.

Q. What time was it when you left the wharf on Saturday afternoon?

A. I wouldn't say positively the time, but it was about half past five or six.

Q. Where was the captain then?

A. I couldn't tell you where he was then; I did not see the captain after I left the wharf.

Q. Where did you last see him?

A. I left the captain on the vessel.

Q. That was about half past five?

A. That was about half past five—between a quarter and half past five.

Q. You did not see him again?

A. Not that evening I did not.

606 Q. At that time this scow of which you speak was just in front of the vessel?

A. Yes, sir.

Q. What was the width of that scow?

A. Twenty feet.

Q. What was the width of the scow that was next to the wharf?

A. I think that was a twenty-foot scow.

Q. When did you next see the vessel after half past five on Saturday afternoon?

A. I saw her the next morning—on Sunday morning—between nine and ten o'clock.

Q. Where?

A. I seen her laying in the wharf there; then she was sinking.

Q. When you saw her on Sunday morning was she in the same position with relation to the wharf that she was when you left her?

A. No, sir; I thought her bow had come in closer to the scow forward.

Q. Much?

A. I can't say how much, but I thought it was closer than what it was on Saturday evening.

Q. Was the stern in the same place?

A. The stern was in the same place; the pole was on just the same as we left it on Saturday evening.

Q. Fastened from the wharf to the vessel?

A. To the vessel; yes, sir.

607 Q. And the other pole was on the wharf, the pole that came down the river?

A. No, sir; that was on the scow.

Q. And the scow that you had pointed out to him was in the same place?

A. In the same place, sir; right forward.

Q. It had not been disturbed?

A. No, sir.

Q. Was the captain on board when you got there?

A. On Sunday morning?

Q. On Sunday morning.

A. Yes, sir.

Q. When did you first see the captain sound?

A. I think the first sounding made was on Friday.

Q. The first you knew anything about?

A. Yes, sir.

Q. What sounding did he make then?

A. He made some three or four or five different soundings.

Q. What were they, and where?

A. I think they were in front, about his after cabin, and I think he made one or two over the stern. The mate did the sounding, really. I did not see the captain making any soundings. He and the mate were together, and I seen the mate cast the line.

Q. What depth of water did he have then?

A. He said there was between fourteen and fifteen feet of water. The first sounding he only got nine or ten feet.

608 Q. Where was that sounding?

A. That was right in front of the derrick.

Q. With reference to the vessel, at what part of the vessel was it—amidships or at the stern?

A. No, sir, it was astern; right about the cabin; about the forward part of the after cabin.

Q. Then they made soundings off the stern?

A. Yes, sir.

Q. How much water did he find there?

A. He said there was sixteen feet over the stern.

Q. Did he make any soundings outside?

A. He didn't make any soundings outside at all.

Q. Did he make any soundings inside, toward the bow?

A. Yes, sir.

Q. What did he find there?

A. Fifteen or sixteen or seventeen feet of water.

Q. That was on Friday afternoon?

A. Yes, sir.

Q. Did you see him make soundings again?

A. I didn't see him make any more soundings on Friday.

Q. At any time on Saturday?

A. No, sir; I didn't see him make any soundings on Saturday.

Q. On Saturday afternoon, did the captain ask you if she was not on something, and did you say that she was on nothing?

A. No, sir; I never made any such answer as that. On Saturday afternoon—I don't think the captain and I had any conversation at all until the evening.

609 Q. Did you say to the captain, "You won't touch here if you are fully loaded on the lowest tide just so you breast her off. If she don't come in aft, there is nothing to hurt you"?

A. No, sir.

Q. Did you tell the captain on Saturday afternoon between five

and half past five o'clock, after you had quit work, that you would be down there on Monday morning to put in another lighter before you commenced work again?

A. No, sir.

Q. Did you tell him anything of that kind?

A. No, sir. I told him on Saturday when we talked, and I left with the understanding—when I took the chute down for him and designated the scow which he could use. I left with the understanding that he was going to haul on high water and on the first high water. He did not say the first high water, but he said that he wanted to shift on high water. That is the way he expressed it.

Q. He said that he wanted to shift on high water?

A. That is the way he expressed it exactly, sir. I took the chute down for him and told him which scow to use.

Q. Did you tell him in any way or give him in any way to understand that you were going to shift it on Monday morning?

A. No, sir; I did not.

Q. Did you give him to understand that you considered this vessel safe there and it was not necessary to move her until Monday morning?

A. No, sir; I did not. If I had done that I would not have made preparations to get the pole and scow and preparations for to put another scow in there.

610 Q. What, if anything, did you do to aid him in shifting on the next high tide?

A. What did I do?

Q. Yes; in the way of supplying him with a pole and scow.

A. I merely took the chute down for him and showed him the scow to be used. I didn't make any preparations, any other preparations, about shifting.

Q. Did he say at any time that he expected you to do the moving?

A. No, sir.

Q. Or give you to understand in any way that he thought you would do the moving?

A. No, sir.

Q. State if he seemed to mean to move or expressed the intention of moving.

A. He expressed the intention of moving, and that is the reason why he asked me to take the chute down for him.

Q. When the vessel sunk how long was it before she was taken away?

A. I could not tell positively how long she laid there, but she laid there for a long while.

Q. Will you state how the vessel being sunk there off the wharf interfered with the transaction of business of Smith & Son and the landing and shipment of stone from that wharf?

Mr. HAGNER: I object to that on the ground stated to the same question asked of Mr. Smith—that is, upon the ground that  
611 it would be allowing the respondent, who filed a cross-libel, to take advantage of his own wrong to claim an injury by

reason of the vessel being sunk if by his instrumentality she had been sunk.

The WITNESS: It was a great impediment to the work. We had no wharf above at all for to load the scows. The only berth we had was below the vessel, and we had all these scows to come out and around the vessel and come in forward.

Q. That is, in loading scows?

A. In loading vessels?

Q. Yes.

A. In loading vessels we had to wheel it across. We had to wheel across one scow and across the sunken vessel into the other.

Q. How many vessels did you load there from August until November? Were you constantly employed in loading vessels?

A. No, sir; not constantly employed.

Q. More or less constantly?

A. If I ain't mistaken, we shipped some stone down to the navy yard and to different points and on the streets, and I think we loaded some three, if not four, vessels. I know there were two or three—three, anyway—that we loaded and wheeled across out there.

Q. Do I understand you to say that all the stone that was loaded had to be wheeled across?

A. All that was loaded into a vessel; yes, sir.

Q. Can you give us any idea of the cost of that in addition to the cost it would have been if you had the vessel up within the reach of the chute?

612 A. No, sir; I could not.

Q. You cannot tell that?

A. I could not state that.

Q. Do you know Mr. Charles Godfrey?

A. Yes, sir.

Q. What is his business?

A. His business there was hoister.

Q. Where was the hoister?

A. The hoister was there where the big engine was; very near the buildings.

Q. Was it near the wharf?

A. No, sir.

Q. Near the edge of the wharf?

A. I believe it is seventy-five feet from the wharf.

Q. Was he in the employ of Smith & Son in August, 1893?

A. Yes, sir.

Q. Mr. Godfrey testifies that he heard the captain talking about the water, and that he asked you how much water there was, and that you said, "Plenty of water." Is that true?

A. No, sir.

Q. It is not?

A. No, sir.

Q. Then he testifies that the captain asked you what you called plenty of water, and that you said, "Fifteen feet." Is that true?

613 A. No, sir. The only conversation the captain and I had with regard to the water was that he asked me about the water, and I told him we never had any trouble except with one vessel; that we had one to catch on us there, but that we had extremely low water and a northwest wind. I told him that we had had it dredged out, and the man that dredged it reported fourteen or fifteen feet of water. He said, "I don't draw that much water when I am loaded." I said, "That is the report he gave Mr. Smith; that he took out between two and three hundred yards of stuff and he reported fourteen or fifteen feet of water." That is the only conversation ever I had with the captain.

Q. The only one?

A. That is the only one in regard to water.

Q. When was that?

A. I think that was on Friday; probably it might have been on Thursday. I won't be just positive as to the date.

Q. Was Godfrey present when that conversation occurred?

A. No, sir; Mr. Godfrey was at the hoister. When the machine was running his business was right there, and he had all he could do to attend to that, because he had to get the signal, and he was simply to hoist the stone from the scow to the machine.

Q. What advice or suggestion did you make to the captain about sounding for himself?

A. I told him to make his soundings; probably that might have been the time when we were talking about that depth of water.

Q. What did he say?

A. He didn't say anything. He and the mate went to sounding, and the mate did the sounding. The captain was present there.

614 WILLIAM BARTON, a witness of lawful age, called by and on behalf of the respondent, having been first duly sworn, is examined—

By Mr. WILSON:

Q. State your name, your age, your residence, and your occupation.

A. My name is William Barton; my age, 32 years; my residence, Washington, D. C. I live on I street, 2413, N. W., and I am working in stone.

Q. And are you in the employ of Messrs. Smith & Son?

A. Yes, sir.

Q. How long have you been in their employ?

Q. I have — working with Mr. Smith ever since he has been in business.

Q. For some years?

A. Yes, sir.

Q. Do you remember the schooner "Ellen Tobin"?

A. Yes, sir.

Q. What were your duties there on the wharf when the "Ellen Tobin" was there?

A. I went out to her and helped to tie her up when she came up.



Q. Do you remember who was on the wharf at that time?

A. Indeed, I do not. I cannot remember all the men that was on there working—the working men that was on there.

Q. Did you see anything of Godfrey there at that time?

615 A. He was in at the hoisting engine.

Q. He was in at the hoisting engine?

A. Yes, sir. He never came out there until after the vessel was tied up.

Q. Now, do you remember being called on to take down the chute?

A. Yes, sir.

Q. On Saturday afternoon?

A. Yes, sir.

Q. After she had been loaded?

A. Yes, sir.

Q. Or partly loaded?

A. Yes, sir; partly loaded.

Q. Now, state how that happened. Where were you and who called you?

A. Mr. Speaker called me down. We just had knocked off from work, and we started to go after our money, and he called us back to take the chute down before we got our money—me and several more men—but I forget who they were just now—John Taylor for one. We went back and taken down the chute and laid it on the vessel there; number 7 scow was between the vessel and the wharf and another light scow was lying right above the vessel, and Mr. Speaker asked the captain—

Q. (Interrupting.) Where was the other light scow?

616 A. Just lying ahead of the vessel. She was lying there, and they were going to shove her between the other scow and the vessel, and the captain said, Shove her in—

Q. When the chute was laid on the vessel where was Mr. Speaker and where was the captain?

A. They were on the vessel.

Q. Did you hear any conversation between them? And, if so, state what it was.

A. Just only I heard Mr. Speaker ask the captain did he think it was safe, and the captain told him "Yes; he thought there was water enough there." He was measuring the water there all the time that the vessel was loading, and the captain told him yes. He said on high tide he would shove the other scow in.

Q. The captain said that to Mr. Speaker?

A. Yes, sir.

Q. What scow did he refer to? Did he point to it or in any way indicate what he meant; what scow it was he was going to shove in?

A. I do not know whether it was number three scow now or not. It was a light scow, I know.

Q. A light scow that was there?

A. Yes, sir.

Q. Did you see anything of a pole there at that time?

A. Yes, sir; there was a pole brought down the river the same day—on Saturday—and there was one on the vessel that she was propped out with.

617 Q. Where was the pole that was on the vessel?  
A. The vessel was propped out with it.

Q. It was propped out with it?

A. Yes, sir.

Q. What time was this on Saturday that you took down the chute and heard this conversation?

A. It was about five o'clock in the evening, sir.

Q. Did you go down to the wharf on Sunday morning?

A. No, sir; I never had any occasion to go down to the wharf any more until Monday morning.

Q. Did you go down to see where she was on Sunday morning?

A. No, sir.

Cross-examination.

By Mr. HAGNER:

Q. Where were you living, Barton, in August, 1893?

A. I was living on I street between—

Q. The same place?

A. Yes, sir.

Q. Did you spend any time up at the quarries at all?

A. Up to the quarry?

Q. Yes, sir.

A. Yes, sir; but not during that time. I did not the time the vessel was there.

Q. Where were you working when the vessel was there?

A. I was upon the platform. I was one of the feeders.

Q. You were on the platform?

A. Yes, sir.

Q. Where was the platform?

618 A. It was right there by the wharf, you know, over where the crusher was.

Q. Was there a platform near the crusher?

A. Yes, sir; there is a platform right at the crusher.

Q. How high is it from the ground?

A. About twelve feet, I guess, near about.

Q. And what were you on the platform for?

A. I was feeding the crusher.

Q. Were you feeding the crusher with the stone as it was raised off the lighters—the big stone—you fed the big stone to the crusher, is that it?

A. Yes, sir.

Q. You say you went out to the Ellen Tobin and helped tie her up? When was this that you had to tie her up?

A. I think it was on a Wednesday.

Q. On a Wednesday?

A. Yes, sir.

Q. That was when she first came there, or was it that you helped to tie her up when the captain shifted her?

A. It was when she first came there.

Q. You are perfectly sure of that, are you?

A. Yes, sir.

Q. And you were out there, and who else was there?

A. Well, I cannot tell all that was there; all the working men around there at the time was there.

Q. Who was there?

A. Let me see. John Taylor was there and myself and another man—another fellow named Kite, he was there, and I disre-  
619 member the other man.

Q. Was Mr. Speaker there?

A. Yes, sir; Mr. Speaker was there, too.

Q. He was there on the wharf when the vessel was being helped in?

A. Yes, sir.

Q. You remember perfectly that Mr. Speaker was there?

A. Yes, sir.

Q. You are not in any doubt about that—that Mr. Speaker was there?

A. No, sir.

Q. Not a bit?

A. No, sir.

Q. Where was Mr. Speaker standing?

A. Mr. Speaker was standing right there by the wharf.

Q. East or west of the wharf. You know what is east and what is west up there, do you not?

A. West of the wharf.

Q. He was up above the wharf, on the up river side of the wharf, was he?

A. Yes, sir.

Q. Do you remember that there were three or four piles just east of the lower river side of the wharf?

A. Yes, sir.

Q. There were three or four high piles?

A. Yes, sir.

Q. What was it that you called the hoister—where was that?

620 A. The hoister?

Q. Yes, sir; the hoister. Where was the hoister? Was it east or west of the crusher?

A. It was west of it.

Q. West of the crusher?

A. Yes, sir.

Q. That was the hoister that you speak of that they put the heavy stone on to help haul it up to the platform?

A. Yes, sir.

Q. The heavy stone was hauled up about twelve feet before you put them into the crusher?

A. Yes, sir.

Q. That is what they call the hoister?

A. Yes, sir.

Q. What is that great big thing east of the crusher, with an arm to it? What do you call that? What is the name of that?

A. East of the crusher?

Q. Yes, sir; that great big thing that has steps on it which comes up there, with big poles—a great big pole—a great big thing for hoisting. What do you call it—a derrick, or what do they call it?

A. The tub you are speaking of?

Q. No; I am talking about east of the crusher. This side of the crusher towards Washington, some little distance, there is a great big thing that sits up in the air there—a great big pole or tree that sets up there—a derrick or what do you call that?

A. There is a derrick there.

621 Q. And that derrick—you do not call that a hoister, but you call the hoister west of the crusher—that is called the hoister?

A. Yes, sir.

Q. And the derrick is how far this side of the crusher?

A. I do not know exactly.

Q. Is it one hundred feet?

A. Yes, sir.

Q. About an hundred feet?

A. Yes, sir.

Q. You say that you thought that the light scow was number what—three? How large is that scow?

A. How large is it, sir?

Q. Yes, sir.

A. I cannot tell you exactly how broad she is.

Q. Is she as broad as those others—is she as broad as number seven?

A. Yes, sir; she is broader; she is the broadest scow on the river.

Q. Do you know how wide she is?

A. Indeed, I do not know, sir, exactly.

Q. Number three is the broadest, is she?

A. Yes, sir.

Q. When you are not hoisting there at the platform what were you doing? Suppose you were not hoisting and suppose you were not crushing, what were you doing?

A. I was knocking around there and cleaning up, and one thing and another.

Q. Did you have to help load the wagons at all?

622 A. Yes, sir; I helped load the wagons sometimes.

Q. Suppose a vessel came in there and got loaded and went off, what would that crusher be doing when there was not any vessel lying there?

A. She would continue running all the time.

Q. And filling what?

A. Filling all the bins.

Q. When the bins were filled what would be done?

A. They would run the stone out on the yard sometimes.

Q. And they keep the engine working there all the time?

A. The engine?

Q. Yes, sir.

A. Yes, sir; when they had work for it to do.

Q. Exactly; but when they were not doing anything there what-  
ever they would knock off for an hour or for half an hour with the  
engine and stop work on the crusher, would they not, very often?

A. Very seldom, unless something or other broke.

Q. Was there not a great deal of dust spreading out, falling out  
of that crusher and lying on the water all the time?

A. No, sir.

Q. All the time that that crusher was working?

A. Dust was flying but very little—went into the water.

Q. Dust was falling there all the time?

A. Yes, sir; dust was flying.

Q. It would depend entirely on which way the wind was  
623 blowing as to which way the dust would blow?

A. There was no dust blowing or falling in the water that  
you could discover.

Q. You could not?

A. No, sir.

Q. How did they help the "Ellen Tobin" in? How did they  
get her in?

A. The tugboat hauled her in.

Q. The tugboat hauled her in?

A. Yes, sir.

Q. What tugboat hauled her in? What tugboat was it?

A. I disremember the name.

Q. Mr. Smith's tugboat?

A. I was just thinking; I do not know whether it was his tug-  
boat or not or whether it was the Gorman.

Q. Well, the tugboat brought her in how far?

A. It brought her chock up to the wharf.

Q. Right up to the wharf?

A. Yes, sir.

Q. Were there any small boats used to help her in at all?

A. Any small boats?

Q. Yes, sir.

A. No small boats at all.

WM. BANTON,  
By E. L. WHITE,  
*Sp'l Comm'r.*

JOHN TAYLOR, a witness of lawful age, called by and on behalf  
of the libellees, having been first duly sworn, is examined—

624 By Mr. WILSON:

Q. State your name, your age, your residence, and your occu-  
pation.

A. My name is John Taylor; my age 40 years; I reside on M  
street, between 26th and 27 streets; occupation, laborer.

Q. You are in the employ of Smith and Son?

A. Yes, sir.

Q. In Georgetown?

A. Yes, sir.

Q. How long have you been in their employ?

A. I have been there ever since they first started, sir.

Q. Several years?

A. Yes, sir.

Q. You were there in August, 1893, when the schooner "Ellen Tobin" arrived there?

A. Yes, sir.

Q. What was your business on the wharf?

A. I was attending to the scows then—captain of the scows.

Q. Moving the scows in and out from the wharf?

A. Yes, sir.

Q. Do you remember when the "Ellen Tobin" arrived?

A. Yes, sir.

Q. What day of the week was it, do you remember?

A. Wednesday.

Q. Do you remember the schooner loading on Thursday and Friday?

A. Yes, sir.

625 Q. And Saturday?

A. Yes, sir.

Q. Do you remember when they stopped work on Saturday evening?

A. Yes, sir.

Q. State if you were sent for by any one to move the chute that carried the stone into the vessel—and, if so, by whom—on Saturday evening, just about the time that you quit work.

A. By Mr. Speaker, the boss.

Q. What did he say to you about it?

A. He told us to go down and take the chute off the schooner and put it on the vessel.

Q. You mean to take the chute down?

A. Yes, sir; to take it down.

Q. And put it on the vessel?

A. Yes, sir.

Q. Did you do it?

A. Yes, sir.

Q. Who helped you?

A. Barton and several men. I do not remember the rest of them.

Q. Where was the vessel then; into what hatch was she lading?

A. She was loading in the bow.

Q. Loading into the bow; forward hatch.

A. Yes, sir; forward hatch.

Q. What was done with the chute after you took it off?

A. We left it on the vessel.

626 Q. Who was there when the chute was left on the vessel, when you took it off and laid it down?

A. The captain and the mate and Mr. Speaker and the rest of the laborers.

Q. Did you see the captain there?

A. Yes, sir.

Q. And the mate?

A. Yes, sir.

Q. And Mr. Speaker?

A. Yes, sir.

Q. Did you hear any conversation between the captain and Mr. Speaker at that time about putting in a scow?

A. Yes, sir.

Q. If so, what was said?

A. He told Mr. Speaker that he would put that scow in on high tide.

Q. What scow was it?

A. I do not know the number of the scow.

Q. Where was she?

A. She was lying up at the bow of the vessel.

Q. In plain sight?

A. Yes, sir.

Q. What did Mr. Speaker say?

A. He told him all right, sir.

Q. How was the vessel fastened to the wharf? Was there any pole between the wharf and the schooner?

A. Only one that I knows of.

Q. Only one fastened there?

A. Yes, sir.

627 Q. Where was that?

A. Down to the stern, I think, sir.

Q. Did you see another pole there at that time?

A. There was one on the wharf, or on the boat; one or the other. I do not know exactly. I could not say exactly.

Q. Where did they come from?

A. It came from up at the quarry.

Cross-examination.

By Mr. HAGNER:

Q. What makes you think that pole was on the stern of the vessel?

A. Because I knowed where it was on the stern.

Q. How was it fastened to the stern of the vessels.

A. It was lashed down with a rope.

Q. And where was the other end of the pole?

A. One end was on the wharf.

Q. And the other end where?

A. The other end was on the schooner.

Q. Where did the end of the pole reach there from the stern of that vessel—the end that was ashore—to what part of the wharf?

A. It reached down to the end (indicating) and away down to the stern of the vessel.

Q. You say that the pole was fastened on the stern of the vessel?



628 A. Yes, sir.

Q. That was one end of the pole?

A. Yes, sir; and the other end was just the same.

Q. Tell us where the other end was fastened.

A. The other end was fastened to the wharf.

Q. How far did the other end come from the crusher?

A. I could not tell you that—how far it came.

Q. About how far? Do you remember where those piles are there, east of the crusher?

A. Yes, sir.

Q. What piling would it reach to?

A. The second one.

Q. It would come about to the second pile?

A. Yes, sir.

Q. And you swear that that pole was there on Friday afternoon, on the stern of that vessel, and was fastened about the second pile from the crusher?

A. Yes, sir.

Q. Where were you when the vessel came in?

A. I was on the wharf.

Q. On the wharf?

A. Yes, sir.

Q. What did you see there? How did she come in?

A. Why, she came right straight in.

Q. She did?

A. Yes, sir.

Q. Well, what brought her in?

A. The tugboat brought her in.

Q. A tugboat?

629 A. Yes, sir.

Q. Who was there on the wharf to help her in?

A. Mr. Speaker and me, and Martin, and the rest of the men.

Q. Where did Mr. Speaker stand?

A. He was standing down towards the lower engine-house.

Q. Was Mr. Godfrey there?

A. No, sir.

Q. Where did you see Mr. Godfrey?

A. Upstairs in the engine-room; the hoisting-room.

Q. The vessel, you say, was brought in by the tug?

A. Yes, sir.

Q. There is no question about the vessel bringing—about the tug bringing the vessel right into the wharf?

A. No, sir.

Q. And what tug was it?

A. I do not know exactly what tug it was; I could not say what tug it was; all I know is I tied the rope to the wharf, to the second pile.

Q. You tied the stern line then to the second pile, did you?

A. Yes, sir.

Q. And who threw you that stern line?

A. The mate.

Q. The mate?

A. Yes, sir.

Q. The mate was on the vessel, was he?

630 A. Yes, sir.

Q. He was on the vessel?

A. Yes, sir.

Q. And who was on the scow? Where were you standing?

A. I was standing on the wharf.

Q. And who was standing on the scow, do you remember?

A. No, sir; I do not remember who was standing on the scow.

There were several other men standing on the scow, but I do not remember who they were now.

Q. How far were you standing from the crusher?

A. About 25 or 30 feet.

Q. And Mr. Speaker was standing how far from you?

A. Oh, about ten feet, I suppose.

Q. Was he nearer the crusher than you were?

A. Yes, sir.

Q. He was nearer the crusher than you were?

A. Yes, sir.

Q. About what pile would he have been standing?

A. The lowest piling.

Q. That is a pile down the river from the crusher?

A. Yes, sir.

Q. That would be about how far?

A. About ten feet.

Q. You did not see any small boat there helping the schooner in?

A. No, sir.

Q. There was no small boat helping the schooner in?

A. No, sir; I didn't see any small boats.

631 Q. Was not any small boat leading the schooner in at all?

A. No, sir.

Q. There is no question about that; is there?

A. No, sir.

Q. None in the world?

A. No, sir.

Q. What makes you think that Mr. Godfrey was up in the hoister?

A. That was his place to be at. He was not down on the wharf.

Q. Where did Mr. Godfrey generally work?

A. Up in the hoisting-room; up in the engine-room.

Q. Hoisting?

A. Yes, sir.

Q. How near is that to the crusher?

A. Well, that is about three or four hundred feet, I suppose.

Q. Three or four hundred feet from the crusher?

A. Yes, sir.

Q. How long had he been in there?

A. He had been in there ever since half past six.

Q. Was the crusher running then?

A. Yes, sir.

Q. What was it doing?

A. Hoisting the stone up for the scow.

Q. Onto what?

A. On the platform.

632 Q. On the platform?

A. Yes, sir.

Q. Was the hoister running?

A. Yes, sir.

Q. Was the crusher running then?

A. Yes, sir.

Q. There is no doubt about that?

A. No, sir.

Q. None in the world?

A. No, sir.

Q. How many scows were there then, between the schooner—as soon as the “Ellen Tobin” was landed there and made fast by the stern line to the pole; how many scows were put in between the Tobin and the wharf?

A. There was two.

Q. Two scows put right in between the Tobin and the wharf?

A. Yes, sir.

Q. All the time that she was there, there was two scows there?

A. Yes, sir.

Q. There is no more doubt about there being two scows there than there is about there being a tugboat to bring her in there?

A. No, sir.

Redirect examination.

By Mr. WILSON:

633 Q. You stated in reply to Mr. Hagner's question that there were two scows between the wharf and the vessel; is that so?

A. Yes, sir.

Q. When were they put there?

A. They were put there the same day that she came in.

Q. Who put them there?

A. Mr. Speaker had the men to put them there.

JOHN TAYLOR,

By E. L. WHITE,

*Sp'l Comm'r.*

Thereupon the further taking of testimony in this cause was adjourned until Friday, November 23rd, A. D. 1894, at 8 o'clock p. m.

E. L. WHITE,

*Sp'l Comm'r.*

634 WASHINGTON, D. C., November 23rd, 1894—8 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the libellants, Mr. Hagner.

Present on behalf of the libellees, Mr. Garnett and Mr. Wilson.

Whereupon cross-examination of the witness WILLIAM SPEAKER.

By Mr. HAGNER:

Q. Mr. Joe Lee, on page 68 of the libellants' testimony, says that Mr. Smith, meaning Mr. Charles G. Smith, Jr., said to him—that is, said to Captain Hankins: "I want you to make soundings yourself, and our superintendent will help you to place the vessel." To whom did Mr. Smith refer when he said that?

A. Indeed I don't know, unless he referred to me.

Q. Who was the superintendent there?

A. He probably had reference to me.

Q. Who kept the time of the men who were running the wagons there?

A. At that time I think Mr. Holmes kept the time.

Q. Who kept the time of all the other men there at the wharf?

A. I kept the time of the men who were employed at the machines.

635 Q. You kept their time?

A. I kept their time.

Q. Who employed those men?

A. Well, Mr. Smith employed them.

Q. Who employed them for Mr. Smith?

A. As a general thing I employed them.

Q. You got them for Mr. Smith?

A. Yes, sir.

Q. Who employed Mr. Godfrey for Mr. Smith?

A. I employed Mr. Godfrey.

Q. Mr. Lee also said in his testimony, at page 71, that the name of the superintendent of the wharf was Mr. Speaker, and that his first name was William. Is that correct?

A. Yes, sir.

Q. Did you also keep the time of the trimmers?

A. Yes, sir.

Q. You stated in your testimony the other night that you began discharging stone into the vessel on Thursday morning. "Thursday morning was the first I put in her." Was that correct?

A. Yes, sir.

Q. You say on the same page: "I recollect of her (that is, the Ella Tobin) coming in there, but just the day and the time I wouldn't be positive about. She came there on Wednesday, in August, the 4th or 5th of the month. It was on Wednesday, but whether she took her berth on Wednesday evening or Thursday morning I would not be positive. I think it was Wednesday evening that she taken her berth, but I did not discharge any stone in her until Thursday morning."

636 Do you remember what time it was on Wednesday evening, or whatever evening it was, that she came in there?

A. I do not.

Q. Do you remember that it was about the time the men quit work there?

A. No, sir; I don't.

Q. Do you remember that she first went up to the soap-factory wharf?

A. I don't remember whether she first went to the soap-factory wharf or whether she came direct into the dock.

Q. The mate has testified that she first came into the soap-factory wharf, as has also the captain of the tug that brought her there, as has also Captain Hankins, the captain of the Tobin, and they testified that they brought her down to the wharf. The mate says he brought her down with a small boat, and they all testify that it was the afternoon they came in there; that as they came in there that afternoon to the soap-factory wharf and that same evening late they came into Mr. Smith's wharf. Can you say whether that is or is not correct?

A. I can't say whether it is correct or whether it is not. We frequently have vessels come there. We have had them to land up there, but whether she was one of them or not I wouldn't be positive as to that.

Q. How many vessels did you have loaded at the wharf after March, 1893, and prior to the sinking of the Tobin?

A. Indeed I couldn't inform you.

Q. About?

637 A. I couldn't make any estimate.

Q. Were there any?

A. After March?

Q. After March, 1893, and prior to the sinking of the Tobin how many were there, as near as you can get at it?

A. I wouldn't state how many there were.

Q. About how many—a dozen or five or one?

A. Well, I might say one.

Q. No more than one?

A. I could say more than one.

Q. There was more than one?

A. There might be. There may have been more than one; I wouldn't be positive, because I didn't keep myself posted about that.

Q. Was there a vessel loaded in there after March, 1893, and prior to the sinking of the Tobin, that was loaded outside of two lighters?

A. I wouldn't be positive as to that, either—that we loaded them outside of two lighters.

Q. One of your witnesses testified here the other night that no vessel had been loaded there except outside of two lighters.

Mr. WILSON: I object to that question because no witness has testified to any such thing.

The WITNESS: If you will allow me I will ratify that. He said that they were outside of two lighters.

Mr. WILSON: He said that there were two lighters between the wharf and the Tobin.

638 Mr. HAGNER: He said that no vessel had been loaded there that did not have two lighters.

By Mr. HAGNER:

Q. You say that you do not remember whether the vessel was brought in by a tug or whether she was brought down from the soap-factory wharf?

A. No, sir; I can't remember whether she was brought in there by a tug.

Q. You can't remember that?

A. No, sir; I don't.

Q. Mr. Wilson asked you a question whether you made a statement direct to the captain with respect to the water, and you say you made no statement direct to the captain. You say, "I never gave the captain any statement about the depth of the water there. I don't think we had any talk at all about the depth of the water until Friday."

Q. Are you sure that is correct?

A. I am sure of it.

Q. Did you ever talk with the mate, prior to Friday, about the depth of the water there?

A. I have no recollection of ever talking to him; no, sir.

Q. Of course you would remember it if you had done it?

A. I don't remember of ever having any. I thought I had answered the question already.

Q. Will you tell us how far the tall derrick on the east of the stone-crusher is from the stone-crusher?

A. No, sir; I couldn't state positively.

639 Q. About how far—how many steps or how many feet or yards?

A. It might be seventy feet. It may be more and may be less.

Q. That derrick is not what you call the hoister?

A. That is one hoister.

Q. That is not what is known there as "the hoister"—what is known there as the hoister?

A. We have two hoisters. We have a hoister or derrick, and we have a hoister to hoist stone to the crusher. The other hoist is up west, beyond the crusher.

Q. Where were you standing on the wharf when the Tobin came in there?

A. When she came in?

Q. Yes, sir.

A. I could not state positively where I was standing. I might probably have been down on one of the scows or I might have been on the lower end of the wharf or at the upper end.

Q. The captain says you were standing just east of the crusher near the third piling.

A. Maybe I was. I won't say positively whether I was standing there or where I was standing.

Q. You know that you were there when she came in?

A. When the vessel came in?

Q. Yes.

A. I was always there whenever a vessel came into the dock. I was somewhere about there, but I couldn't say positively.

640 Q. It was your duty to be there when a vessel came in, was it not?

A. It was; when a vessel was given a berth the machine was stopped.

Q. Do you remember any vessel being brought in there and given a berth while the machine was running?

A. Yes, sir.

Q. When was that?

A. Frequently they can take their berth; but we don't discharge the stone, because very often the machine is running there and we are depositing the stone into the bin.

Q. The mate said that the machine was not running at that time, and I want to know what your recollection is about whether that machine was running there at the time the Tobin came in or not.

A. I could not say positively. I wouldn't say whether it was running or whether it was not running; probably the machine may have been stopped in making preparations to discharge stone into her.

Q. If the crusher had been running, one of the engineers would have been with the engine, would he not?

A. Yes, sir.

Q. And one of the engineers might or might not have been at the eastern engine just directly on the wharf, might he not or would he not?

A. There was one man employed there and there was one man up at the other hoist.

Q. One man was always directly on the wharf at the eastern engine over in that little frame engine-house east of the crusher?

641 A. You mean there at the derrick?

Q. Yes, sir; just east of the derrick.

A. There was one man employed there and there was another one—

Q. There were other engines there?

A. Other engines.

Q. There were two other engines besides that one, were there not?

A. Yes, sir.

Q. Where are they situated?

A. They are over in the brick building.

Q. Over in the brick building?

A. Over in the brick building.

Q. That is an old warehouse, is it not?

A. It is an old warehouse; yes, sir.



Q. Both these other engines are over in that brick building?

A. Yes, sir.

Q. When the big engine is running you are always with it?

A. No, sir.

Q. You are not?

A. I am not always with it.

Q. You said you had a conversation with the captain on Friday afternoon as to the depth of the water after you had changed the vessel. Just tell us what that was.

A. After I had changed the vessel?

Q. Yes, sir.

A. Well, the captain and I were talking about the depth of the water and he asked me the water. I told him that the  
642 men that had dug out and dredged had reported fourteen or fifteen or sixteen feet of water. That was when he made his first soundings.

Q. Were you in company with Mr. Smith on the wharf at the third or fourth piling on Friday afternoon, during which time the captain had a conversation with respect to the depth of the water close in near the third or fourth piling, with respect to some stones having fallen in there off the lighter?

A. Was I present?

Q. Yes.

A. When he and Mr. Smith had a conversation?

Q. Yes.

A. I have no recollection of being present when they were together.

Q. Were you present when you and the captain had such a conversation with respect to stone falling off the lighter?

A. He and I had a conversation and I must have been present there.

Q. Were you present there with him when such a conversation occurred?

A. With the captain?

Q. Yes.

A. I was there. The captain and I was talking when he shifted the vessel. I was there when they put the pole on.

Q. You were present at that conversation with the captain on that occasion?

A. Yes, sir; I was there.

643 Q. What was the first day that any pole was used in breasting that vessel off from the wharf?

A. It was on Friday.

Q. Are you sure of that?

A. I am sure of that, sir.

Q. Is it not a fact that all day Thursday that vessel was breasted out by a pole from the bow of the vessel or from very near the bow, and the pole was almost immediately west of the crusher, within two or three feet west of the crusher or within a very few feet west of the crusher, all day Thursday?

A. I don't know whether we had one there or not. We frequently used a pole for that.

Q. The captain says that that is the case; that this pole was used on the bow of the vessel at the bit, and that it was used there——

Mr. WILSON: The captain did not say that at all.

Q. He did say that it was fastened to the bit at the bow of the vessel, and that the other end was just west of the crusher, a few feet west of the crusher, resting against the bank.

The WITNESS: West of the crusher?

Q. Yes.

A. There probably might have been a pole there, because frequently we used to put a pole there when the vessel was high.

Q. Do you remember the characteristics of that pole which was used, the shape of it and all.

644 A. The shape of it?

Q. Yes. Do you remember that it had two prongs on it at one end? It was a tree, was it not?

A. It was a young sapling.

Q. And it had two prongs on it at one end?

A. I don't recollect whether it had two prongs or three prongs; but I think there was a knot on it there.

Q. Was it two prongs or three prongs?

A. It might have had.

Q. The captain says these prongs were out near the bit and were fastened to the bit with a strap or rope. You know what they use?

A. Yes, sir.

Q. That was put on there on Thursday. Do you recollect about that?

A. I have no recollection of using it there, although we have used them in that way for the purpose. Often when we have a schooner laying there she would beat so hard against our lighters that we were unloading that we couldn't shift them, and we frequently put a pole on there to sheer them off just enough to shift our lighters back and forth.

Q. There never was any vessel loaded there which was allowed to rub against the lighters at all, was there?

A. Oh, yes; but we would put fenders down.

Q. They never allowed a vessel to rub against the lighter?

A. Oh, no.

Q. Because it would rub the paint off?

A. We are very careful of that. We always use a fender down between the lighter and the schooner.

645 Q. Now, we will come to Saturday morning. You say that during the day—Mr. Wilson's question regarding Saturday morning is as follows: "During the day what, if any, conversation did you have with the captain about moving the vessel and as to her position there?" You answered that: "A. During the day we talked of moving her out, and we talked about finishing the work by wheelbarrows." Was that or was it not the first conversa-

tion that you ever had with Captain Hankins, the captain of the schooner Ella Tobin, in which you mentioned wheelbarrows?

A. At that first conversation on Saturday?

Q. Yes.

A. I won't be positive whether we ever talked previous to that or not; but I know we talked of it on Saturday.

Q. The captain says that that was the first time he ever heard of it. I want to ask you if you could remember about that?

A. I couldn't say positive whether we had anything previous to that or not.

Q. Where were you when you had that conversation about wheelbarrows on Saturday with Captain Hankins?

A. I couldn't say positively where I was. I might have been on the wharf or might have been over at the engine. I frequently came to the engine-house and frequently was out at the schooner. I might have been on the schooner or I might have been on the wharf or over to the engine.

Q. Was Mr. Smith present when you had that conversation just mentioned with Captain Hankins?

A. No, sir; Mr. Smith was not on the place on Saturday  
646 at all. He might have been there on Saturday morning, but I don't think he was, though.

Q. When the vessel was breasted out with that pole was the pole not used as a fulcrum and the lines of the vessel used to keep her steady on that fulcrum?

A. What pole are you talking about?

Q. The only pole which she was breasted out with.

A. The pole on the after end?

Q. On whatever end it was and wherever that pole was used on that vessel to breast her out. Is it not a fact that the pole was simply used as a fulcrum and the lines of the vessel—the hawsers, you know—used to regulate her on that fulcrum? Do you understand what I mean?

A. I understand. I know what a fulcrum is. The pole was used to keep the vessel breasted off from the wharf, and if the lines were not there to steady the pole the pole would drop.

Q. I am not speaking of the lines that were fastened to the pole, but I am speaking of the hawsers—the vessel's ropes—the hawsers on the vessel. Were not the hawsers put on the bow and the stern of the vessel to hold her in position while the pole was used as a fulcrum? Do you understand what I mean?

A. I understand.

Q. Is that correct or not?

A. No, sir.

Q. It is not correct?

A. The pole used as a fulcrum?

647 Q. Yes.

A. What do you term a fulcrum? What I call a fulcrum is—there (indicating) is a fulcrum. I have got a lift on that with a lever, and I call that a fulcrum.

Q. That is all right. You are speaking of a fulcrum perpendic-

ularly and I am speaking of a fulcrum horizontally. Is it not a fact that the pole was used—your knee being the vessel and my finger being the pole, and the lines of the vessel—that is, the hawsers—being on the bow and stern of that schooner—that the pole was enabled in that way to breast her out? Is that right?

A. To breast her off at one end, of course.

Mr. WILSON:

Q. Do you mean to say she was pulled in and out by means of the pole?

Mr. HAGNER: I do not mean to ask if she was pulled in and out, but whether she was held stationary there all the time the pole was breasting her out; whether she was not held stationary by the hawsers of the vessel.

A. She was held stationary by the pole and the lighter that was on the inside of it. The lines and pole on one end wouldn't have held her stationary in the position the pole was in without the lighter on the inside of her, because the pole was at one end of her and she wouldn't have had a fulcrum there to hold her.

Q. Is it not a fact that there was at least from six to eight feet between the Tobin and any lighter that would be at the wharf?

A. At the after end of her there was, but not at the forward end there was not.

648 —. Do you mean to say that every lighter that was brought in between the Tobin and the stone-crusher pressed against the side of the Tobin or against the side of the buffer which was put between the Tobin and the lighter?

A. At the forward end it would, sir. When we unloaded we very often had to push her off; that was on Friday and Saturday.

Q. I can only ask you the question, then, how long that pole was—that pronged pole.

A. How long it was?

Q. Yes, sir.

A. I never measured it, but I suppose it was 45 to 50 feet.

Q. The captain measured it, and he made it——

Mr. WILSON: Please note an objection to counsel stating what the other witnesses have testified to and repeating their answers or what are said to be their answers to the witness and asking him about his recollection based upon their answers.

Q. The pole has been shown to me very much less than that length.

Mr. WILSON: I object to that as not being the fact.

Q. I ask you again whether or not—whether that pole was, if it was not simply used as a fulcrum and the wharf hawsers of the vessel used for the purpose of keeping the vessel steady—whether her bow was out or her stern was out.

A. I can't get onto your idea of a fulcrum. I can't see that it was any fulcrum, being at the after end of the vessel.

649 Q. If what I ask you is not correct, would it not have required two poles all the time to have breasted out the Ella Tobin instead of one?

A. No, sir; not the way we were working there.

Q. Why not?

A. Simply because we always had a lighter or two lighters on the inside of her, and sometimes three.

Q. Did you ever have two lighters on the inside of her abreast of each other?

A. No, sir; we never did.

Q. Was there not intentionally room enough left between the Tobin and the wharf to enable the lighter to pass easily between the Tobin and the wharf?

A. At the after end there was.

Q. At the after end?

A. At the after end, but at the forward end not. Very often when the lines were taut we would have to sheer the vessel off a little bit to shift our scow when it was heavily loaded.

Q. When the lines were taut?

A. When the lines were taut very often we had to slack the lines a little forward to let the lighter in.

Q. How would that lighter go? Would it come out the same way it went in?

A. Sometimes it would pass on through, and sometimes we would take it out the other way.

Q. Take it out as you brought it in?

A. Yes, sir.

Q. And sometimes you would go all the way through?

650 A. Yes, sir.

Q. When was that long wooden chute from which vessels were loaded put on—the stationary one?

A. I couldn't tell you when that was built.

Q. Was it built prior to or subsequent to the small chute being built?

A. It was built after the small chutes.

Q. How long afterwards? I don't expect you to give the day or the hour.

A. I couldn't say how long it was after. It might probably have been two years or eighteen months or something like that, or maybe three years.

Q. About how long, then? I don't ask you exactly how long. About how long before the sinking of the Tobin had the long chute been put there—about how many months?

A. I couldn't tell you that. You know there was many a vessel there before the Tobin came in, and I couldn't tell you how long it was.

Q. Had the long chute been put there prior to the dredging, in April, 1893?

A. Yes, sir.

Q. Had it been put there prior to Christmas, in 1892?

A. I couldn't say whether it was prior to that or not.

Q. Is there any mode by which you can ascertain that?

A. I couldn't say how we could get at that. I helped to put it there, but I declare I couldn't say when it was put there.

Q. I would like very much to know that.

A. I know I helped to build it.

651 Q. Will you tell us when that iron chute was made?

A. The iron chute was made at the same time the wooden one was made.

Q. Some time along in 1893?

A. Yes, sir.

Q. Who made that iron chute?

A. I assisted in making it. Mr. Devine and I made it.

Q. What was it made of?

A. It was made of iron.

Q. What kind of iron? I want to know whether it was cast iron or wrought iron.

A. It was malleable iron—sheet iron.

Q. Where was it made?

A. It was made in the warehouse.

Q. You got the sheet iron and made it right then and there?

A. Yes, sir.

Q. The long wooden chute is a stationary, fixed chute there, is it not?

A. No; you can take it down.

Q. But still it is stationary there—it stays there all the time?

A. It stays there all the time; yes, sir.

Q. How far is the bottom of that chute, as it stays there, from the wharf?

A. Indeed I couldn't tell you that.

Q. About how far?

A. Do you mean from the top of the chute to the wharf?

Q. No; from the bottom of the chute to the wharf.

652 A. At the outer end, you mean?

Q. In Libellants' Exhibit No. 8, Wise, I call your attention to a chute, the bottom of which I mark with a letter S. I want to know how far it is from that end of that chute where the letter S is up to the wharf or to the uprights of the crusher, which are within one foot of the wharf.

A. I can't give you the distance.

Q. About how far?

A. I suppose it is 25 to 30 feet.

Q. Please tell us how long that iron chute was that was put on to the other one.

A. I think that was about 16 to 20 feet. Probably it may have been less than that.

Q. From 16 to 20 feet?

A. Yes, sir.

Q. Less than 20?

A. Less than 20, I think. I think that was two sheets of iron. I think the iron is 8 feet. If I ain't mistaken, I think the chute was 16 feet; probably it may not be over 15.

Q. On the angle at which it would be adjusted to the other chute, it would make the chute come out to nearly 16 feet in addition to the other chute, would it?

A. No; we never used the full 16 feet.

Q. Did you and the captain, on Saturday evening, just before or when you quit work, look at the schooner's markings forward and say that she was two feet down by the head and was drawing 12 feet 10 inches of water forward?

A. No, sir.

653 Q. You did not?

A. No, sir.

Q. You are certain of that?

A. I am positive, sir. The captain called my attention to it.

Q. I say so.

A. He called my attention to it, but not to the depth of the schooner.

Q. Did you not say that the schooner was drawing 12 feet 10 inches of water forward?

A. No, sir; I did not.

Q. You did not say that?

A. No, sir; I did not say that.

Q. Did you not on that Saturday evening, just before you quit work or just after you quit work, look at the schooner with the captain?

A. The captain and I were standing right under the hoisters.

Q. Under what hoist—the east hoist?

A. No; the west hoist.

Q. What happened there?

A. The captain says to me—he says, “I believe that I am ebbing out a little,” and he says, “I wouldn't like to put any more in forward; she is near about on a level keel now and I wouldn't want to get her in down by the head; that the vessel is making some water and I don't want it to get away from the pumps.”

Q. Was there any pump forward?

A. Not to my recollection. I don't know of any.

654 Q. Do you know how many pumps there were on that vessel?

A. I do not.

Q. Don't you know there were three?

A. I do not.

Q. Don't you know there was one aft, one mizzen, and one forward?

A. I do not.

Q. Well, there was as shown in the diagram by the captain's testimony and by the testimony of every person who pumped on her, and practically every witness in the case.

A. I don't know of there being there.

Mr. WILSON: Please note an objection to Mr. Hagner's declamation.

Q. When were the small chutes put on there?



A. I couldn't tell you—the small chutes?

Q. Yes.

A. The small chutes were put on there when the building was erected.

Q. Were you there when the building was erected?

A. I was, sir.

Q. In what year was that?

A. I think it was in 1890; '90 or 91, I don't know which.

Q. Where did that pole that she was breasted out with come from?

A. It came from up to the quarry.

Q. How long had it been down there?

A. I couldn't tell you that. We had several poles there.

Q. Was there any other pole than that one called to the cap-  
655 tain's attention and shown to him, except, as you say, the one that was brought down Saturday on the lighter?

A. Was there any other pole?

Q. Yes.

A. I don't think there was. I don't think we had but the one pole at the wharf at the time. There might have been probably another one laying there. We sometimes had two or three of them around there, but some fellow would get hard up for wood and carry them off. Then we would have to go to the quarry and get more.

Q. You say you don't know now how long that pole was?

A. I said it was between 45 and 50 feet, but I never measured the pole.

Q. How often was the pole shifted?

A. How often was it shifted?

Q. On the vessel.

A. I don't think it was shifted but once after we put it on there; possibly they may have used a block and tackle to sheer her away a little further.

Q. You think it was only shifted once?

A. I don't think the pole was shifted at all after it was put on the vessel; on the after end of it. I have no knowledge of the pole being anywhere else on the vessel.

Q. Apart from the pole that you said was on the lighter, you are sure that you never called the captain's attention to any other pole except the one with which the vessel was breasted out?

A. Call his attention to any other pole? I did. I called his attention to the pole that was coming down the river on the scow.

656 Q. Apart from the pole that you said was on the lighter, you are sure that you never called the captain's attention to any other pole except the one with which the vessel was breasted out?

A. I don't know what that question is.

Q. Except the two poles, one with which the vessel was breasted out and the other to which you stated you called the captain's attention as being on the lighter, did you ever call the captain's attention to any other pole than these two?

A. I have no recollection of ever calling his attention to any other but these two. I probably might have had other poles laying on the wharf there, but not sufficiently long enough for the purpose.

Q. You say that you told Captain Hankins that another vessel had gotten aground there in that berth. Be kind enough to state when you told him that.

A. I wouldn't be positive whether it was on Friday or whether it was on Saturday.

Q. You are certain you said that to him?

A. I told him there was one vessel grounded.

Q. Where were you when you told him that?

A. I couldn't say where I was, whether I was on his vessel or on the wharf or where I was.

Q. How often were you on his vessel with the captain prior to the vessel being sunk?

A. I couldn't tell you. I was on there very frequently. I would go on there to look at the trimmers, to see that they were in there.

657 Q. You were on there many times a day, were you not?

A. I wouldn't say many times, but I have been on there, though.

Q. Frequently?

A. Frequently I was on the vessel; yes, sir.

Q. How much stone could you put in the vessel and trim there in a day?

A. It depends on how the machine is. If the machine is working well we probably would put in 200 tons.

Q. Would the trimming have any effect on the progress with which you could get the stone into the vessel?

A. If I didn't have a sufficient number of trimmers there it would, but I always manage to have trimmers enough in the hold to trim away the stone as fast as it was discharged into the vessel.

Q. Did you put in 200 tons a day on the Tobin?

A. I probably put in 200 tons on Friday. On Thursday I didn't put in 200 tons. On Thursday I made a very light day. On Thursday, in the forenoon, I did a very light day.

Q. How could you tell how much stone went in?

A. We couldn't tell anything accurate at all, only by the lighters. We measure the stone that goes to the machine and in that way we can get at it.

Q. You measure the stone while it is in bulk on the lighters?

A. Yes, sir.

Q. And then you can tell how much goes through the crusher?

A. We can tell how much goes through the machine; yes, sir.

658 Q. And that is the way you approximate how much you put on?

A. That is the way we approximate it?

Mr. WILSON: What is the way?

Mr. HAGNER: By measuring the stone on the lighter.

Mr. WILSON: He did not say that at all. He said he measured the stone as it went through the crusher.

By Mr. HAGNER:

Q. Do you say that you measured the stone as it went through the crusher?

A. The stone that passed through that machine was measured, but I didn't say where we measured it.

Q. Could you measure it in the crusher?

A. No, sir; I don't think I named where I measured it at. I said that all the stone that passed through the machine was measured.

Q. Where did you measure the stone that passed through the machine?

A. We measured it on the scow.

Q. Just approximate how much stone was put into the Tobin each day while she was being loaded. Just approximate. I don't want it exactly and don't expect it.

A. It would be a difficult matter for me to tell that, because I don't know the number of lighters that I put in or anything about it.

Q. You began by stating that you put in 200 tons on Friday.

A. I think I got in about 200 tons on Friday.

Q. And about how much on Thursday?

659 A. I don't believe I got in over a hundred tons on Thursday, if I got in that much.

Q. How much on Wednesday?

A. Don't go so far back.

Q. You don't think there was more than 300 tons in her, do you?

A. I think there was a little more than 300 tons. I think there was between three and four hundred tons.

Q. Will you give us what you think was the amount of stone in the Tobin when she sank?

A. I think there was between three and four hundred tons in her.

Q. Whenever you directed the captain to move the vessel did he not do it?

A. I had no business directing the captain when to move the vessel. He did the directing himself. That was his business. When he wanted the vessel moved that was his business to do it. I never directed him to move the vessel at all. That was apart from my work altogether. I was there to assist him in moving, but I never gave him any directions when to move his vessel.

Q. Is it not a fact that the captain each time that he moved that vessel went to you before doing so and asked you if he could not move it, and asked you where he could move it, and if it would be safe, every time that it was moved?

A. The vessel never was moved but once.

Q. When was that?

A. That was on Friday.

660 Q. That was when what was done to her; where was she moved?

A. She was moved from the after-hatch to the forehatch.

Q. Did he not ask you then—did he not then come to you?

A. I don't know; I don't recollect whether he came to me or not.

Q. He says that he did come to you and ask you if he couldn't move the vessel some two feet further out in order to clean up the deck from the dust from the crusher that was constantly falling in there, and you allowed him to do it.

A. I allowed him to move the vessel?

Q. Yes.

A. I had nothing at all to do with him moving his vessel; he could move his vessel as long as I could discharge into the hatch. I had no right to dictate to him where he should move his vessel.

Q. State how or what directions were given the only time you say the vessel was moved. Who gave the directions?

A. He gave the directions where to move.

Q. He did?

A. Yes, sir.

Q. Did he not first ask you if he could move it?

A. Why should he ask me? I had nothing to do with his moving the vessel.

Q. I don't ask you why, but I want to know whether he did or not.

A. I don't have any recollection of him asking me.

661 Q. You don't recollect about that?

A. No, sir; I don't.

Q. At the time of the injury and for some time prior thereto Mr. Smith, Senior, had been away from town and was then away. After Mr. Smith, Junior, left, on Saturday morning, who had charge of the general directions there?

A. Who had charge?

Q. Yes.

A. He generally left Captain Bowen in the office there in charge.

Q. Is it not a fact that Captain Bowen is a book-keeper?

A. He is a book-keeper; yes, sir.

Q. How often does Captain Bowen come down to direct about vessels?

A. I never knew him to come down and give any directions about vessels.

Q. Is it not a fact that you had charge there in the absence of Mr. Smith, Junior, and Mr. Smith, Senior?

A. I say I had charge of the plant. I did; yes, sir.

Q. How often did you see that vessel pumped?

A. I didn't see her pumped at all.

Q. You never saw her pumped?

A. No, sir; not to my recollection.

Q. At what time did you go to the wharf in the morning?

A. I would go there by 6 or half past 6 o'clock.

Q. What time would you get away at night?

A. Sometimes half past 5 and 6 o'clock and sometimes later.

Q. You never saw her pumped at all?

662 A. Not to my recollection. I didn't see any pumping out.

Q. You did, however, see her pumped pretty extensively on Sunday, did you not?

A. I didn't see her pumped any on Sunday. I was not down there twenty minutes on Sunday.

Q. At what time did you go there on Sunday?

A. It was between 9 and 10 o'clock when I got there.

Q. Did you go away then?

A. Yes, sir; I went away.

Q. And came back at 12 o'clock?

A. No, sir; I didn't make but one visit. I don't think I was down there during the day after that.

Q. What time did you leave the wharf on Saturday?

A. I wouldn't be positive what time it was. It was along about 6 or half past 5 o'clock.

Q. Where did you go then?

A. I went home, I suppose.

Q. Where is your home?

A. I lived on Bridge street then.

Q. Not where you live now?

A. No, sir.

Q. How many men do you say it took to take the iron chute off and put it on the schooner?

A. Indeed I didn't say how many it took. I don't know how many were there.

Q. About how many?

A. Five or six. It may have been more and may have been less.

663 Q. Could you move that vessel out from the hatch in which the chute was, further out from the wharf, without taking the chute down?

A. Further out from the wharf?

Q. Yes.

A. We could breast her off in some way. You could breast her out, but it was inconvenient to move from one hatch to the other with the iron chute attached into the wooden chute, because the rigging would interfere. There was no way to hold the vessel off.

Q. Could you move that vessel off with the chute still remaining in the hatch?

A. I suppose it could be done; yes, sir.

Q. It would be exceedingly inconvenient to do it, would it not?

A. It would be some inconvenience to do it.

Q. Is it not a fact that it was entirely Captain Hankins' own suggestion to you that the chute should be taken out?

A. He asked me to take the chute out.

Q. What was his object in asking that?

A. The object was that the chute wouldn't be any interference

with him in putting another scow abreast of the one that was in there.

664 Q. That is your answer to that. The captain says that his object was that he might, before you got to work on Monday morning, have the vessel ready for you to put the stone in without a delay of yourself and workmen in getting another lighter in. Is that correct or not?

A. Repeat that question, please.

Q. That is your answer to that. The captain says that his object was that he might, before you got to work on Monday morning, have the vessel ready for you to put the stone in without a delay of yourself and workmen in getting another lighter in. Is that correct?

A. I do not know what his object was. That is not the way I understood it.

Q. Was not that the way in which he put it to you on Saturday evening after your men had quit work and gone up to get their pay, and was it not upon that suggestion—upon your suggestion—that the men were brought back to the work and the chute removed?

A. The men were brought back at his suggestion, or his request, rather. He requested me to remove the chute, so that he could get the other scow in between; that the chute would not interfere or get into his rigging when he was going to shift on high water.

Q. Is it not a fact that you had already quit work and were going away when the captain came to you and said that he wanted to get the chute out before you should get to work Monday morning, so that he might get dispatch, as he said or as he put it?

665 A. No, sir; we had quit the work. I had not left the work. I had not quit work. The men though—

Q. Where had you gone?

A. I was on the wharf, sir, standing right on the wharf, at the hoist; he and I together. The men had quit work and the engine had shut down and the men had gone after the pay and I left them and went out and brought the men back to take the chute down.

Q. Had you not already started to the office, and did not the captain call you back and make that suggestion to you?

A. Probably I might have started. We were both under the hoist there at the west end of the plant.

Q. Do you positively remember saying to the captain that the tugboat captain had gotten that pole, and that it was on the lighter, and that it was all ready for use?

A. Yes, sir.

Q. Do you remember saying that?

A. Yes, sir; I remember saying that. I called his attention to it. That was during our conversation on the wharf.

Q. Do you remember his saying, Yes; that will be all right now?

A. Yes, sir.

Q. Do you remember that?

A. Yes, sir.

Q. He said that you never called his attention to that second pole at all; that he did not see it?

A. He did not see it?

666 Q. Yes, sir.

A. Why, I called his attention to it as we were talking there; I think while we were taking the chute down. The tug-boat was rounding to and I called his attention to it, and I said, Captain, I see that Mr. Broughton—that is the foreman—has sent our other pole down.

Q. And the pole was on that lighter coming in with that tug. Is that the idea?

A. Yes, sir.

Q. And that was just at the time that you had quit work?

A. Near about five o'clock Saturday afternoon.

Q. Saturday afternoon?

A. Yes, sir.

Q. Why was it they always interposed two lighters between the vessels?

A. Why was it?

Q. In putting it in, putting on the final one hundred tons of stone?

A. We never did that, I do not think, with but two vessels.

Q. You did not?

A. No, sir; I have no recollection of ever using it only with two vessels—that is, wheeling on to two.

Q. Mr. Smith does not agree with you.

A. I will not be positive whether there were any more. I know we finished the cargo on two.

667 Q. Why was it that you ever put wheelbarrows to work loading the stone which Mr. Smith has said cost about .20 a ton to put on the vessel?

A. What time and when do you mean; previous to the sinking?

Q. Yes, sir; every time previous. I am talking about previous to and up to that time. Why was it you ever put wheelbarrows on there?

A. Well, the captain was not satisfied with the depth of the water.

Q. What captain?

A. The captain of the vessel. That is the only time we ever resorted to wheelbarrows when we were not satisfied of the depth of water, and then we would shove out and finish with the wheelbarrows.

Q. What made them dissatisfied with the depth of the water?

A. I suppose there was not enough of it there.

Q. How did they know that?

A. By sounding.

Q. Have you seen them sounding there?

A. Yes, sir.

Q. Have you seen captains of vessels sounding there?

A. Yes, sir.

Q. Repeatedly?

A. Yes, sir.

Q. Did you know how much water was there?



A. No, sir. I have seen them sounding.

Q. But you have seen captains sounding?

A. Yes, sir.

668 Q. And you never had curiosity to see—you never had curiosity enough to see how much water they got?

A. No, sir; I never did.

Q. Did you ever sound there yourself?

A. No, sir; I never made any soundings there; no, sir.

Q. Does not that strike you as rather extraordinary, that you should not know if you had seen captains sounding there, and that you should not have curiosity enough to see what the soundings were?

A. No, sir.

Q. Why was it that you say that you told the captain that you wanted another lighter in there?

A. Why was it I told him?

Mr. WILSON: I object to that question on the ground that he has not said anything of the kind, that he told the captain that he wanted another lighter in there.

Q. Why was it that you told the captain that the lighter lying one hundred feet above the Tobin—

Mr. WILSON: He has not said anything of that kind, either.

Q. —was ready for him to put in between the Tobin and the lighter already there?

A. Why was it?

Q. Mr. WILSON: I object to the question as assuming the witness has said something that he has not said at all. There is nothing about the lighter being a hundred feet above the Tobin.

A. Why, because he asked me which lighter he should take, and I pointed this lighter out to him.

669 Q. Did you not say that you suggested to him that another lighter should go in there?

A. He had talked of that—he and I together.

Q. And you had suggested it, you say, as I understand it?

A. I might have suggested it—he might have suggested it; we were talking together.

Q. And you might have suggested?

A. I might have suggested it or he might have suggested it.

Q. Why should you have suggested it?

A. Why should I have suggested it?

Q. Yes, sir.

A. Well, to be on the safe side, to lay over Sunday.

Q. To be on the safe side of what—for fear of what?

A. For fear?

Q. Yes, sir.

A. Well, he said he was ebbing out and he thought he was aground.

Q. He said he was tipping by the head?

A. No, sir; he said he was ebbing out.

Q. Did you not say that he was tipping by the head?

A. No, sir; I did not say he was tipping by the head. I did not see it until the captain called my attention to it, and I ain't seen it yet—that she was ever tipping by the head.

Q. The captain did call your attention to it?

A. He called my attention—he said he thought she was ebbing out.

670 Q. And said that he thought that she was down by the head?

A. He said that he did not want to get her down by the head—that was the expression he made to me; that she was ebbing out and he did not want to get her down by the head.

Q. Why was that suggestion made about the other lighter, the other scow?

A. Why was it?

Q. Yes, sir.

A. The suggestion was made then that the lighters should be put in there to lay over Sunday.

Q. Why?

A. Why?

Q. Yes, sir.

A. I do not know why the suggestion was made.

Q. You made it; you ought to know why. You say you made it.

Mr. WILSON: I object to that question. He did not say that he made any suggestion.

Mr. HAGNER: He has said that he made it. I object to the gentleman objecting to the question, because he has said that he made the suggestion, made the suggestion himself, and I want to know why he made it.

A. I said that I did not know whether I made the suggestion or whether the captain made it.

Q. You wanted the captain to act on the suggestion?

A. He called my attention to it and asked me what scow he should use to put in there, and the question between the  
671 captain and I was that the two scows were to lay in there over Sunday, and then take the second scow out on a Monday and use the poles; that was the idea of the poles.

Q. You say that the plan was that on Monday two poles should be used?

A. Yes, sir.

Q. Now, tell us why a suggestion was made by either you or the captain about putting another vessel in there for Sunday, another lighter in there for Sunday?

A. Well, when he said that he was caught, probably the suggestion might have been made then—he said he was ebbing out—that is the way he expressed it. Of course he was caught if he was ebbing out. That is the way he expressed it. He said that he

thought he was ebbing out and he did not want to get by the head.

Q. What did you say to that. Did you say that you thought he was on something or not?

A. I do not know that I made any reply or not.

Q. Did you tell him that the vessel was all right?

A. No, sir; I did not.

Q. Well, if he said you did, he is wrong about that, is he?

A. Yes, sir.

Q. Dead wrong?

A. He must be wrong about it.

Q. I think you have already stated that you did not think the crusher was running when the Tobin came in?

A. I could not be positive whether she was running or not. Very often we took them in that berth when she is running and sometimes when not.

672 Q. Did you call to the captain at all when he was coming there?

A. I have no recollection of calling to him at all.

Q. If the crusher had been running, would there have been any use in calling?

A. Not a great deal, unless you called very loud.

Q. No man could call loud enough to be heard ten feet off if that crusher was running, could he?

A. Oh, yes, sir; yes, sir; unless you put your head down into the machine.

Q. It was pretty noisy?

A. Yes, sir; but you can make yourself heard. There is plenty of noise around there.

Q. Mr. Speaker, was there any mode whatever of breasting off, breasting a vessel off there, except that you did it with the poles?

A. I never used any other.

Q. You never used any other?

A. No, sir; sometimes we would breast a lighter from the dock.

Q. How would you do that?

A. Oh, sometimes take and lash a short pole to the lighter and shove her out.

Q. That was always done with a pole?

A. Yes, sir; with something on the dock.

Q. Do you remember telling Captain Hankins at any time that there might be some stone dropped off the lighters in the river there near by—the third or fourth pile, or in there under those chutes?

673 A. Well, I probably might have. There have been small stones dropped off there.

Q. You might have told him that?

A. Yes, sir.

Q. That there were small stones dropped off the lighter?

A. I never knew of any large stones being in there, and I have been on the wharf there now for about five years.

Q. Did you see the captain or the mate sounding on the inside to see how much water there was?

A. I did.

Q. Did you see them both sounding there?

A. I do not recollect. I have no recollection of seeing the captain sounding. I seen the mate—I think he has sounded—the only one I seen them make was one when we put the pole on Friday. I seen them make the soundings then. I think I was standing on the scow.

Q. On the scow?

A. On the lighter between the vessel. They made soundings there on the inside near the stern.

Q. Did you help them to breast the schooner off?

A. I do not know whether I did or not. I don't know whether I personally took hold myself.

Q. Did your men take charge of the butt end of the pole on the wharf, and the captain's men take charge of the pronged end of the schooner?

A. In all probability they did. We always lend a hand when they did such work as that. If I am not mistaken some of the *emn* were on the schooner after we got the pole up and helped to breast off. Some of the men were helping to pull on the tackle.

674 Q. Whose men?

A. Some of the men from the machine.

Q. When they were breasting off did you tell them to look out for small stones on the inside, and that there was nothing to hurt except on the inside?

A. I did not. The captain he made the first sounding there and only found, I think, 9 feet of water.

Q. Only found what?

A. Nine feet of water. That was before the pole was put on there. That was when the pole was put on.

Q. Where was he sounding when he only found nine feet of water?

A. Right out from the derrick.

Q. That is right in opposite the third or fourth piling, is it not; the sweep of the derrick?

A. Where do you mean?

Q. From the east end of the crusher?

A. There are three or four or five piles down over there somewhere. I do not know how many piles there were in there.

Q. It was about there—just east of the crusher.

A. It was just east of the crusher; just there at the sweep of the derrick, but that was before we put the pole on that he made that. I think that he took that sounding off the scow.

Q. When you started away from there on Saturday evening, leaving the chute in, when did you expect to take it out?

A. I did not expect to take the chute out until we finished.

675 Q. When was that?

A. Whenever we could not reach the vessel with the chute I expected to take the chute out. Whenever the poles would not

admit us to come in close enough to work the chute on the vessel, then I was going to take the chute down.

Q. Do you remember pointing to the fourth pile from the crusher and east of the crusher to the captain and saying that the berth was dug out last spring from the fourth piling, below the crusher down the river, and that the schooner would not touch bottom there when fully loaded, even at low water?

A. I pointed out to him how far we dredged, but as to the vessel not touching when she was fully loaded I did not say anything of the kind.

Q. Did you not tell the captain and the mate of the schooner that if they breasted the schooner off so her side, as you expressed it, did not hit below the fourth piling there -as nothing to hurt the schooner?

A. No, sir.

Q. You did not say that?

A. No, sir; they satisfied themselves of that after they breasted it off; they made the soundings, and the captain said there was plenty of water there. He made his soundings from the stern around on the inside up above the pile and all along the side, and he made his first sounding out from where he got ten feet of water, and he got  $15\frac{1}{2}$  feet of water and he said, That is plenty of water. I am only drawing  $13\frac{1}{2}$  feet aft now.

Q. What was going on on the schooner when you were down there Sunday?

676 A. Indeed, I could not tell what was going on there on Sunday; it was so crowded, and the spectators had charge then; she was filling with water and her decks were coming up; you could hear them cracking. I do not think that the tide was then full; when I was down there the tide was just making and you could hear the timbers crack.

Q. The mate says that you were on the vessel with him forward when he said to you, I will sound as the captain told me to sound when I hauled back. Then he got the lead and the line was sounded and found, you being still there,  $13\frac{1}{2}$  feet of water on the inside quarter about eighty feet east of the long chute; then the mate sounded again about half way from the yawl-boat davit down to the rudder over the stern and found  $14\frac{1}{2}$  feet of water; then he sounded again about forty feet east of the long chute on the inside and found 15 feet of water; then the mate says, "Mr. Speaker said there is more water forward, and when you have finished loading you will have plenty of water." Are those statements correct?

A. Not to my recollection. I recollect of his making his soundings.

Q. You remember of being on the schooner there with him?

A. I probably might have been on the schooner; I have no recollection of it; I was frequently on the schooner and talked with the mate.

Q. Do you remember telling him when they hauled ahead and finished loading there would be plenty of water?

A. No, sir; I did not.

Q. Do you know of any custom on the Tobin of pumping out at six o'clock in the evening and six o'clock in the morning?

677 A. I do not.

Q. You do not know about that?

A. No, sir; at 6 o'clock in the morning and at 6 o'clock in the evening I was very seldom out on the wharf. My duty was with the machine, and I was getting it started; I got generally started at half past six and quit at half past five. I very seldom got out on the wharf until after the machinery was started.

Redirect examination.

By Mr. WILSON:

Q. On Saturday afternoon how many scows were there between the wharf and the Tobin?

A. How many scows?

Q. Yes, sir.

A. Well, I would not say positively; there might have been two or three.

Q. How were they placed?

A. Placed one fore and aft right along the wharf.

Q. Not abreast of each other?

A. No, sir; not abreast.

Q. Mr. Hagner asked you about loading the vessel. You said that on Thursday you put on board about one hundred tons and on Friday about two hundred tons—that made three hundred tons. Where was that put?

A. That was put in the after-hatch.

Q. And on Saturday you put on board about one hundred tons?

A. A little more than one hundred.

678 Q. And that was put in the forward hatch?

A. Yes, sir.

Q. Were you down in the hold at any time on Saturday afternoon?

A. I will not be positive whether I was or not on Saturday afternoon.

Q. Who was at work down there trimming?

A. I had some six or seven men there. I do not know their names. Ike Taylor was one, I know, and a man named Woolfork, and I do not know who all.

Q. Did you at any time while the Tobin was at the wharf give to the captain any directions whatever as to where he should place his vessel or how he should manage her or how he should move her?

A. No, sir; I did not.

Q. Did you give him any advice as to where he should place her or where she should be placed or where she should be moved?

A. I did not give him any directions at all; I did not give him any advice at all. When we first started to load we had a difficulty with the stone running out. We did not have incline enough. The vessel was so high that after we attached the iron chute she did not have incline enough to discharge the stone into the hatch, and for

the first half of the day I had considerable trouble because the stone would block, and then I would have to stop the machine and shovel the stone out.

Q. When was the pole attached to the aft part of the vessel?

679 A. That was Friday afternoon.

Q. Friday afternoon?

A. Yes, sir.

Q. And when was the sounding when he found nine feet of water?

A. That was about the same time we put the pole on. I think the first sounding we made was before the vessel was sheered off at all.

Q. You never made any soundings there yourself?

A. No, sir.

Q. All the information you had you got from the man who dredged the place out?

A. That is all the information that I had.

Q. You undertook to give the captain no more information than you had received?

A. That is all the information I had.

Mr. HAGNER: Is not that leading? I object to these questions as leading.

Q. Did you tell him from whom you had received the information that you gave him?

Mr. HAGNER: I object to these questions as leading.

A. Yes, sir; I told him.

WM. SPEAKER,  
By E. L. WHITE,  
*Sp'l Comm'r.*

680 JOHN W. CATRELL, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined—

By Mr. WILSON:

Q. State your name, age, residence, and occupation.

A. John W. Catrell; Washington county, Maryland; age, thirty-one the 17th of March coming; running an engine for Mr. Smith going on four or five years, ever since we have been there, most.

Q. Where were you employed in August, 1893?

A. With Mr. Smith.

Q. With Mr. Smith—with Messrs. Smith & Co., of the Potomac Stone Company?

A. Yes, sir; Mr. Smith employed me.

Q. Do you remember the arrival of the Ellen Tobin at his wharf?

A. Yes, sir.

Q. In August, 1893?

A. I remember when she sunk there; yes, sir.

Q. What were your duties there on the wharf at that time?



A. Running a h-isting engine.

Q. Do you remember the day she was sunk?

A. I remember the Saturday. Of course I do not know whether she sunk in the night or in the morning. I remember I came down on Sunday. I don't know rightly what time it was that the deck was giving just a little——

Q. Then she sunk on that morning?

681 A. Yes, sir.

Q. On the day before that, on Saturday, do you remember of seeing the captain and Mr. Speaker together?

A. Yes, sir.

Q. Were you near enough to hear the conversation that passed?

A. Yes, sir; I was pretty close to them, because I was talking to Mr. Speaker just before that.

Q. You stated that you heard it. State what you heard Mr. Speaker tell the captain in regard to the placing of a second scow there.

A. I heard the captain say, "We will get the vessel off on high tide."

Q. What did the captain say about placing another scow there?

A. Well, I do not exactly remember; I do not exactly understand. The only thing that I understood is Mr. Speaker says, "There is Jumbo; put her in." That was a scow that lay at the bow of her.

Q. At the bow of the Tobin?

A. Yes, sir.

Q. He said, "There is Jumbo"?

A. Yes, sir.

Q. What did the captain say then?

A. The captain said, "We will get her off on high tide."

Q. Did you go down on Sunday morning; and, if so, at what time?

A. Well, sir, I could not state what time I came down.  
682 They told me that the vessel had sunk and I came down. I do not know what time it was in the day; I could not tell you. Mr. Kroon, the watchman, told me about it and I came right down.

Q. On Saturday how many scows were there between the wharf and the Tobin?

A. Two.

Q. How did they lay?

A. They were laying close together, only one was laying at the crusher and the other one back under my derrick.

Q. One above the other?

A. Yes, sir.

Q. They were not abreast?

A. No, sir.

Q. Do you remember seeing the mate sound on Saturday or the day before?

A. No, sir; I do not remember seeing the mate sound on Saturday.

Q. Do you remember seeing him sound the day before?

A. On Friday when the pole was put there I went to help push her out with the blocks they had on the poles, and the captain says, "That will do." The mate had the line on the other side, sounding, but I do not know what he said then—how much water or anything was there. I just seen him.

Q. Where was the pole?

A. The pole was at the fourth piling—lashed to the fourth piling.

Q. What part of the vessel?

A. On the aft.

683 No cross-examination.

JOHN W. CATRELL,  
By E. L. WHITE, *Sp'l Com.*

ISAAC TAYLOR, a witness of lawful age, called by and on behalf of the libellees, having been first duly sworn, is examined—

By Mr. WILSON :

Q. What is your name?

A. Isaac Taylor.

Q. What is your age?

A. Fifty-two.

Q. Where do you live?

A. Georgetown—no; city, I mean.

Q. What was your occupation in August, 1893?

A. I was working for Mr. Smith.

Q. Where did you live and what was your occupation in August, 1893?

A. I lived on New Hampshire avenue.

Q. In the city?

A. Yes, sir.

Q. And you were employed by Mr. Smith?

A. Yes, sir.

Q. The Potomac Stone Company?

A. Yes, sir.

Q. Do you remember the schooner Ellen Tobin being at the wharf of the Potomac Stone Company in August, 1893?

A. Yes, sir.

Q. When did she arrive there, and what had you to do with her loading?

684 A. All I had to do was I was in there trimming her.

Q. Where; down in the hold?

A. Yes, sir; aft.

Q. Aft?

A. Yes, sir,

A. Do you know when they began to load her?

A. Thursday.

Q. And where was the stone put Thursday and Friday?

A. Aft.

Q. And where was the stone put on Saturday?

A. Forward.

Q. And when did they stop loading?

A. They stopped on Saturday evening.

Q. About how much stone did they put in aft?

A. Well, I do not know exactly how many they put in there, sir; I could not tell you that.

Q. Two days' work?

A. No, sir; I could not tell you exactly how many was in there.

Q. When you stopped work on Saturday how much stone was there amidships?

A. About half loaded.

Q. Half loaded?

A. Yes, sir.

Q. And more than half loaded in the stern?

Mr. HAGNER: I object to Mr. Wilson stating that more than half was in the stern as leading.

Mr. WILSON: That is a question. How much was she loaded in the stern?

685 A. She was loaded a good deal more in the stern than she was in the bow.

Q. She was loaded a good deal more in the stern than she was amidships?

A. Yes, sir. A good deal more, sir; about a foot more.

Q. What time did you stop loading?

A. Five o'clock.

Q. On Saturday afternoon?

A. Five o'clock, I think, Mr. Speaker blowed the whistle.

Q. Who told you how to trim the vessel?

A. The mate.

Q. Was he down there directing the trimming?

A. Yes, sir; he was down there in the morning.

Q. On Saturday morning?

A. Yes, sir; he showed us how to trim and where to trim at.

Q. You went according to his directions?

A. Yes, sir.

Q. Did you receive instructions from anybody else about it?

A. Nobody else at all but the mate.

Q. He told you where to put the stone?

A. He did; yes, sir.

Q. How many hatches were there in the vessel?

A. Two.

Q. Where—one forward and one aft?

686 A. Yes, sir.

Q. How far were they apart?

A. I do not know exactly.

Q. About; could you give us any idea?

A. They were a good distance apart; I know that.

Q. Who was working with you down there trimming?

A. A man by the name of William Massey.

Q. William Massey?

A. Yes, sir.

Q. Who else? Anybody else?

A. William Woodfork and the other ones; I do not recollect their names; there was four of us; I do not recollect the other men's names.

Q. State if you saw any water in the hold.

Mr. HAGNER: I object to that as leading.

By Mr. HAGNER:

Q. State the condition of the vessel.

By Mr. WILSON:

Q. State if you saw any water in the hold on Saturday evening.

Mr. HAGNER: I object to that as leading.

A. Yes, sir; I saw some water.

Q. Describe, if you please, what water you saw, where it was, and what the quantity was.

A. Well, I could not tell what the quantity was exactly, sir; it was up on the skin; it came over the keelson and went down below and then went up on the skin of the vessel. I suppose there was about between four and five inches.

687 Q. State if you saw the water coming in; and, if so, where.

A. I did not see it coming in, sir. I could not see it, but I know it riz.

Q. When did you first notice the water?

A. In the afternoon.

Q. In the afternoon of Saturday?

A. Yes, sir.

Q. Where in the vessel did you first notice it?

A. Right alongside the keelson.

Q. Alongside the keelson?

A. Yes, sir.

Q. How did you happen to notice it?

A. I stepped in it and got my foot wet in it.

Q. Was it dark in there?

A. Yes, sir; it was dark in there.

Q. What were you doing when you noticed the water alongside of the keelson?

A. What was I doing?

Q. Yes, sir.

A. I was trimming the stone.

Q. Where were you putting it then?

A. I was putting it under the cabin, where the captain told me to put it—the mate; the captain did not tell me. The mate told me how far to put it under the cabin.

Q. You were under the cabin?

A. Yes, sir; trimming under there.

688 Q. State what position that was with reference to the vessel. Was it fore or aft of the cabin or where you were working? Were you under the cabin?

A. Yes, sir.

Q. It was near the stern, was it not?

A. Yes, sir; the stern was where I worked at, sir.

Q. Did you tell how much water you noticed there? If you did, I did not hear you.

A. Between four and five inches.

Q. Was there any pumping done that day?

A. Not as I knows of, sir. I never heard the pump turn a bit, not while I was working there I did not hear it. He might have pumped out in the evening after we left, but he did not pump out while we were there.

Q. Either Thursday or Friday or Saturday?

A. No, sir; neither one.

Q. Do you remember hearing the whistle blow?

Mr. HAGNER: I object to that as leading.

Q. Do you remember hearing the whistle blow to stop work on Saturday?

Mr. HAGNER: I object as leading.

A. I did, sir.

Q. Where were you when the whistle blew Saturday afternoon?

A. Trimming the vessel.

Q. What did you do when you heard the whistle blow?

A. Stopped trimming and came out. It was time to stop work.

Q. When you came out did you see Mr. Speaker?

689 A. Yes, sir.

Q. Where was he?

A. Mr. Speaker was on the wharf.

Q. Any one with him?

A. No one with him but the captain.

Q. The captain of the Tobin?

A. Yes, sir; they were both out there on the wharf.

Mr. HAGNER: I object to the question as leading.

Q. Did you hear any conversation between the captain and Mr. Speaker?

A. No, sir; I did not.

Q. Did you see the captain of the Tobin down in the hold any time while you were there trimming?

A. No, sir; I did not see him. There was no person down there but the mate to show us what to do.

Q. If he had been down there you would have seen him, would you not?

A. I would be mighty apt to see him.

## Cross-examination.

By Mr. HAGNER :

Q. How many lighters were between the Tobin and the wharf?

A. One—

Q. Wait a minute—when the Tobin first came in there?

A. There was but one when she first came in.

Q. What?

A. There was not but one.

690 Q. What day did the Tobin come in there?

A. She came in Wednesday, I think it was. I think it was a Wednesday she came in. We went to work on her on Thursday.

Q. Do you not know that there were three lighters abreast of each other right opposite the stone-crusher when the Tobin came in front of the wharf, and that she did not come in for that reason, but went up to the soap factory above? Do you not know that?

A. Yes, sir; I know she went up there.

Q. Did you not know that there were three lighters in there then?

A. There was; but you know that she didn't have but one when she first came in.

Q. I asked you when she first came in there whether she did not have three lighters there.

A. There was lighters there loaded with stone waiting to be unloaded.

Q. Abreast of each other?

A. Yes, sir.

Q. Three of them?

A. Yes, sir.

Q. Did you see her hauled down from the soap factory?

A. I did, sir.

Q. The evening she came to Georgetown?

A. Yes, sir; the evening she came to Georgetown she hauled down.

Q. How did they haul her down?

691 A. They hauled her down with a line, sir.

Q. Was the little boat there taken from one of the other vessels that they put on the front to haul her down with? Do you remember that?

A. I did not see any boat there, for you know you can reach the lines and haul her down with the line.

Q. Did you not see the mate bring a little boat with the line on it down to the lighter?

A. I did not see that, sir.

Q. You did not see that?

A. No, sir.

Q. Did you see her come in there at all?

A. I saw her come in.

Q. You did?

A. Yes, sir; but I did not take notice.

Q. Who was on the wharf when she came in?

A. I cannot recollect. I could not tell you that exactly.

Q. How many masts did the Tobin have on her?

A. She had three, sir.

Q. How many?

A. Three.

Q. How many pumps did she have on her?

A. She had one pump on her, I know. I did not notice any more. She had a pump aft. I did not notice whether she had a pump forward or not.

Q. How long did you trim forward?

A. I did not trim forward at all. I trimmed aft altogether.

692 Q. How many days did you trim on her?

A. I trimmed on her Friday and Saturday.

Q. You did not trim on her Thursday?

A. No, sir.

Q. Where were you Thursday?

A. I was doing something else Thursday.

Q. What were you doing?

A. Loading the wagons around the yard.

Q. You go up to the quarries there?

A. Sometimes; I am like a bad penny. I am first one place and then the other.

Q. Who tells you where you are to be?

A. The boss man.

Q. Who is the boss man?

A. Sometimes Mr. Speaker and then sometimes Mr. Smith sends me to the boat or somewhere else.

Q. Did you ever see Mr. Godfrey around there?

A. Godfrey?

Q. Yes, sir.

A. I did, sir.

Q. Do you know him?

A. He was our engineer once.

Q. Do you know him when you see him?

A. I do, sir.

Q. Did you see Mr. Godfrey out on the wharf the afternoon the Tobin came there?

A. I disremember; no, sir. I do not think I seen him. He might have been there, but I did not see him. I did not  
693 take notice of him; there was always so many passing on the wharf.

Q. Did you call the mate's attention to the water coming just above the skin of the vessel?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Why did you not?

A. Well, the reason why I did not the mate was so cross, and he appeared like he did not want no person to dictate to him anything about it. He said he knew his own business, and I thought if he



knew his own business it was best for me to attend to my own business and for him to attend to hisn.

Q. When was it that you saw the mate there last?

A. I saw him there directly after dinner.

Q. After dinner when?

A. On a Saturday evening. I did not see him any more after I went down there.

Q. What did you say to him Saturday afternoon, after dinner?

A. Nothing at all, sir.

Q. Where did you see him?

A. When I was going down the hold I seen him up on the deck, sir.

Q. What did you say you had to do with the mate there?

A. Me?

Q. The mate told you where to put it?

694 A. Yes, sir.

Q. So the mate told you where to put it Saturday afternoon, after dinner?

A. No, sir; he came down in the morning.

A. Saturday afternoon, after dinner?

A. He did not come down there.

Q. But you saw him there?

A. I saw him up on the deck when I went down in the hold.

Q. The captain never came near you at all?

A. No, sir; the captain never came down there at all.

Q. And did you see the mate there Sunday? Were you there Sunday?

A. I was not there Sunday.

Q. You were not there Sunday at all?

A. No, sir; I was not there Sunday at all.

Q. And did you trim in the after-hatch first, and then after the vessel was brought back and the trimming went on in the fore-hatch did you still work on her?

A. I still worked in the after-hatch, sir.

Q. What were you doing in the after-hatch after she was hauled back and the loading began in the forward hatch?

A. We had stone enough there to trim in the after-hatch.

Q. And you kept on trimming there?

A. Yes, sir; I was trimming where the mate told us to put it.

Q. You got the stone, of course, from the pile which was thrown into the after-hatch?

695 A. Yes, sir.

Q. And you began throwing it back with the shovel or with what?

A. With the shovel.

Q. In back under the cabin, where the captain stays?

A. Yes, sir; there is where I put it.

Q. And you kept on throwing that in there for how long? All of one day?

A. Yes, sir.

Q. All of one day?

- A. Yes, sir.
- Q. Not more than one day?
- A. No, sir; Friday we trimmed amidships.
- Q. You say you put your feet in some water?
- A. Yes, sir.
- Q. When was that?
- A. Saturday evening.
- Q. And that water was where?
- A. It was aft, near the keelson.
- Q. And how far did it come? Was it on the port or the starboard side of the keelson?
- A. It was on the starboard side of the keelson.
- Q. Was there any on the port side?
- A. I did not trim on that side, and I did not see any. It was only where I was at.
- Q. And you had been trimming on that side all day?
- A. Yes, sir.
- Q. And you did not trim any on the other side at all?
- 696 A. No, sir; I did not trim on the other side at all?
- Q. Was there a man trimming on the other side?
- A. Yes, sir; other men were trimming on the other side.
- Q. How many men were trimming on that other side?
- A. Four men on a side.
- Q. How many men trimming in the after-hatch?
- A. We had four men trimming.
- Q. In the after-hatch?
- A. Yes, sir.
- Q. Two on your side and two on the other side?
- A. Yes, sir.
- Q. How many men in the forward hatch?
- A. The same thing in the forward hatch.
- Q. Eight men trimming altogether?
- A. Yes, sir.
- Q. How much of the skin of the vessel did you see there, down there near the keelson?
- A. Well, I saw a space as far as from here to you.
- Q. From you to me?
- A. Yes, sir; about that space.
- Q. About how far would you say that was—three feet?
- A. That is over three feet.
- Q. Four feet?
- A. Yes, sir.
- Q. And you saw a space of water on the skin of that vessel four feet wide—was that the idea?
- A. No, sir; it was right alongside of the vessel.
- Q. It was not four feet wide?
- 697 A. No, sir.
- Q. It was not over a foot wide?
- A. It was not over a foot wide.
- Q. And how deep?
- A. Between four and five inches.

Q. About a foot wide and four or five inches deep ?

A. Yes, sir.

Q. Do you know anything about vessels ?

A. Me ?

Q. Yes, sir.

A. I know them when I see them.

Q. And that is about all you know about them, is it not ?

A. Yes, sir.

Q. Have you ever been aboard vessels any ?

A. Not much. I have been on scows all my lifetime, pretty much.

Q. You never sailed on a vessel ?

A. No, sir.

Q. You do not know where a pump is on a vessel ; you do not know how far it is from the bottom ?

A. No, sir.

Q. You do not know how far the bottom of the pump is from the bottom of the outer skin of the vessel ?

A. No, sir ; I do not.

ISAAC TAYLOR,

By E. L. WHITE,

*Sp'l Comm'r.*

698 THEODORE CURTIS, a witness of lawful age, called by and on behalf of the libellee, having been first duly sworn, was examined—

By Mr. WILSON :

Q. What is your business now ?

A. Teamster.

Q. Who do you work for ?

A. Mr. Smith.

Q. How long have you been working for him ?

A. Oh, about two years.

Q. Were you working for him in August of 1893—that is a year ago last August ?

A. Yes, sir.

Q. Do you remember the schooner Ellen Tobin ?

A. Yes, sir.

Q. At the wharf of the stone company in August, 1893 ?

A. Yes, sir.

Q. Do you remember the day she sunk ?

A. Yes, sir ; I remember it was on Sunday.

Q. On Sunday ?

A. Yes, sir.

Q. What was the first information you had about it ?

A. I was in the office of Mr. Smith, and the captain came to me—he came in there and asked me would I come out there and pump. He said his boat had sprung a leak and asked me would I come out and pump.

Q. What time was that ?

A. A little before nine o'clock. I told him I would pump for him for twenty-five cents an hour, and he said he wouldn't  
699 give me but fifteen cents. I told him I would not pump for that. He went on out, and after that Mr. Smith's watchman came in and told me to go out there; that he was going to pay me more money. I went out there, and he said he would pay me twenty cents an hour. He looked at his watch to see what time it was, and said it was nine o'clock. I started to pump for twenty cents an hour.

Q. How long did you pump?

A. I pumped three hours.

Q. Three hours?

A. Yes, sir.

Q. And then why did you stop?

A. He told me to stop; that there was no good pumping any more.

Q. What was the position of the vessel when you stopped pumping?

A. Very near full of water.

Q. Did she keep on leaking?

A. Yes, sir.

Q. Who else was pumping?

A. Me and a man named George Johnson, two sailors, and another man by the name of Payne—Sam. Payne.

Q. How many pumps were going?

A. He had three pumps on there, but he did not run but two at a time. We run one pump and broke that, and then we did not run but two.

Q. What kind of pumps were they; do you know?

A. Two of them had a kind of a lever on them, and  
700 pumped up and down like this (indicating), and the one aft had two handles to it. That is the one that broke.

Q. Did you see the water in the vessel when you first went on board?

A. Yes, sir; you could just see the water coming through the stone.

Q. Coming up through the stone?

A. Yes, sir.

Q. Where did you see it?

A. Down in the hold.

Q. Was it forward or aft?

A. In the aft.

Q. In the after-hold?

A. Yes, sir.

(No cross-examination.)

THEODORE CURTIS,  
By E. L. WHITE, *Sp'l Com.*

The further taking of these depositions was thereupon adjourned subject to notice.

E. L. WHITE, *Sp'l Com.*

701 WASHINGTON, D. C., *December 6th, 1894*—8 o'clock p. m.

Met pursuant to agreement.

Present on behalf of the libellants, Mr. Hagner; present on behalf of the libelees, Mr. Wilson and Mr. Barnard.

Mr. HAGNER: I want to give notice that I desire to recall a man named John Taylor for further cross-examination.

JULIUS WANNER, a witness of lawful age, called by and on behalf of the libelees, having been first duly sworn, is examined—

By Mr. WILSON:

Q. Please state your name, age, residence, and occupation.

A. My name is Julius Wanner; I am thirty-five years old; my occupation is that of a submarine diver.

Q. Where are you now employed?

A. At Winship point, for the canal company.

Q. In what work are you engaged?

A. I am repairing a lock for the present.

Q. How long have you been engaged where you are now at work?

A. Thirteen days.

Q. Where were you employed just prior to going to work where you are now working?

702 A. At the Aqueduct bridge.

Q. What were you doing there?

A. I repaired all the piers but one for the Aqueduct bridge. I am not through yet.

Q. Under whose direction?

A. Under the direction of Shaeler & Schneglau, the contractors.

Q. Where does that firm carry on business?

A. In Chicago.

Q. What experience have you had as a submarine diver? How long have you been engaged in that business?

A. I have worked at all kinds of work under water—submarine work—and I have been in the business a little over fourteen years, or somewhere in that neighborhood.

Q. Do you carry on business in your own name; and, if so, what is the name of your firm and where is it located?

A. I am a contractor and belong to Chicago. I take contracts for water work or anything in that line that comes in my way.

Q. What submarine work have you done in Chicago?

A. I done the water-work system, and I am doing the city works at present. I have all the city works, their crib work, etc., and have been employed for seven years by the Government in Chicago repairing breakwaters and placing breakwaters and inspecting breakwaters.

Q. Have you had any experience as a diver in the east on tide water?

A. Yes, sir; I have done some inspection for the Government at Hell Gate?

703 Q. When was that done?

A. That was somewhere about thirteen years ago, or somewhere in that neighborhood?

Q. Do you know the Messrs. Smith, the respondents in this case, and do you know their wharf in Georgetown?

A. Yes, sir.

Q. Do you know where their stone-breaking apparatus is?

A. Yes, sir.

Q. Will you please state whether or not you have recently made an examination of the ground under their wharf?

A. Yes, sir.

Q. When did you make that examination and how was it carried on?

A. I will have to refer to the time book and tell you about the date.

Q. Did you make a memorandum of it?

A. I have got the time made in the time book.

Q. Was it November the 18th?

A. Yes, sir; last month.

Q. Now answer how you made the examination.

A. I worked off from a scow and used a lead line for a guide.

Q. State first if you put on your submarine armor and went down.

A. Yes, sir; I put my uniform on and went down and went over the whole ground, ninety feet from the dock.

Q. You went over the whole ground ninety feet from the dock?

704 A. Yes, sir.

Q. And a distance along the front of the wharf for what width?

A. For some one hundred and thirty or a hundred and thirty-five feet; somewheres in that neighborhood, the whole width.

Q. Will you state if you made a sketch or drawing showing where you went down and what you found and the various depths of the water?

A. Yes, sir.

Q. Will you examine this paper and see if that is the paper (exhibiting a paper to the witness)?

A. Yes, sir; that is the drawing.

Q. Did you make that after you came out?

A. Yes, sir; each one of these articles I marked out before each pool.

Q. Will you state where, with reference to the wharf, you first went into the water, in what direction you proceeded, and what you found?

A. I started from the derrick—that is, away from the bin. I started from the derrick and I traveled—

Q. You went down into the water?

A. Yes, sir; I went down into the water. I went down below and made four shifts. I covered all the ground.

Q. Just reply to my question as to where you went.

A. The first find was twenty feet from the derrick.

Mr. HAGNER: The first what?

705 The WITNESS: The first object I found was twenty feet from the derrick and thirty-five feet out in the river from the dock.

By Mr. WILSON:

Q. From the edge of the wharf, you mean?

A. From the wharf—I found a three-foot-square stone—a stone that appeared to have dropped off from a scow. My next find—

Q. That is down on this paper?

A. Yes, sir; that is down there.

Q. What did you find between that stone and the edge of the deck?

A. A big, high pile of rubbish, silt, riprap, and so forth. Then forty-five feet from the derrick and sixty feet out I found a flat rock seven feet square and an adjoining one three feet by four. They were both flat rocks. Then the next one was seventy-six feet from the derrick and sixty feet out.

Q. From the edge of the wharf?

A. From the edge of the wharf and fifty feet out in the river I found a boulder or nigger-head, whichever you may call it, round, about three feet in diameter, and sugar-loaf like—round. Adjoining to that I found a snag, which the branches held up two feet from the bottom. It was a tree branch, adjoining the boulder. Ninety feet from the derrick and ninety feet out I found a big double rock, with a little ridge over the top, nine feet by twelve, which was uncovered. I don't know how much there is of it covered up. Just what was uncovered was about nine feet by twelve. My next travel

706 I made beyond here (indicating). I discovered nothing except the bottom pretty nearly level of small stones and sand, and so forth; but I found from my starting point a good deal of silt and mud that covers the bottom, except in my last survey, where it is all small stones up that way. Then the next thing I done after I had made these sections was that I undressed myself, and, after taking our measurements of the distances to our stones, I got into a row-boat with a lead line and took soundings.

Q. Do these figures in red ink indicate the soundings that you made?

A. Yes, sir.

Q. How did you make them?

A. We have a lead line that tells us the feet, and we travel on a straight line, seven or eight feet apart, and take soundings at every interval, backwards and forwards. We were then traveling north and south. Then we would come back here and go over the ground again crosswise, and we find that our bottom varies a little in different places. Knowing, according to my soundings on the boat, and knowing how high the stone sticks out of the ground, I deduct the amount of water over the stone after taking the soundings all



around. Knowing how much the stone sticks out into the water, I deduct the water from the rock.

Q. And how far it sticks up above the bottom?

A. Yes, sir; above the bottom. For instance, this stone here, the one that is sixty feet from the dock, I make fifteen and a half feet of water over the rock. We have got fifteen to eighteen and twenty feet of water around it.

707 Q. Those figures over the rocks that are respectively sixty and fifty feet from the wharf indicate correctly the depth of water there?

A. Yes, sir; at that hour.

Q. At what time was that made?

A. It was made at twelve o'clock, noontime, on November 18th, 1894.

Q. State the character of the bottom west of the first rock figured on the left-hand side of this drawing and the space in front of the wharf that you examined.

A. I am a little lost in the compass here.

Q. That is going upstream?

A. Across the bridge is west, is it? I always took that to be north. I found a good deal of riprap and a good deal of stone and sand and mud, as mentioned.

Q. Everything that you found is mentioned there?

A. Yes, sir.

Q. In one or two places I see marked here "small stone" and "stone."

A. There is a red outline that I make to show that the stone runs irregular. Now, there was a lot of stone being lost here (indicating), and this red outline shows about how the stone and riprap run, and that lays west. In here, outside of this red line, we have got mud and silt. The silt is softer than the natural bottom, and our stone lays principally over here. It gets pretty shallow up this way. The further west I go the shallower it gets. They have got deep water east.

708 Q. State what stone of any size you found between the stone that is marked here as being fifty feet from the wharf and the wharf, except the stone in the left-hand corner.

A. It was only small stone. I don't suppose it would weigh anything exceeding fifty or sixty or seventy-five pounds apiece.

Q. State how thoroughly you made the examination of that bottom immediately in front of the wharf.

A. I covered it—every foot of it.

Q. You covered every foot of it?

A. Yes, sir; the way I proceeded in doing the work I can't fail to cover up every inch of it.

Q. Just explain how you proceed to do it.

A. From the scow, before I go down, I throw out a lead line forty or fifty feet, just as far as a man could throw it. Then I take this lead line in my hand and I go down below with it. I take it and turn it in my hand until I get out to the lead line—until I go as far as the lead line will reach. Then I take the line along with me

and I go on the opposite side of the lead line out into the river forty or fifty feet; then I make circles back and forward, and when I get back to the starting point I take in about two feet of the line and come back on the next circle; then I take in two feet and come back on the next circle, and in traveling back and forward that is the way I cover every inch of the land. If there is an object lost within fifty or a hundred feet and it is told to me where it is within fifty and a hundred feet, I can always find it in that way. That is

the only way I do my work in covering up ground. This  
709 lead line is a kind of a guide to me, and with a signal to my tender it keeps him well posted in what location I am. Now, the way I found these stones and the way I located the distance was that we had four scows side by side on the east end alongside of the dock. That gives us the distance out in the river. When I would come onto a stone, I would stand on it, after having inspected it, and would signal to my tender to look where my air bubbles escaped, and that tells him exactly where I am; then he takes a sight from the scows and the distance from the scows over to the dock. That gives him the distance, and we mark the place on the shore. We know how wide the scows are. They are twenty feet wide. When I come up to the surface I make a sketch of the stone and take the distance as the tender gives it to me. Of course, we can't take any measurements under water. We have got to do it from the top.

Q. There are two lines on this drawing that you made. That lower line represents the wharf?

A. No, sir. this outer line is the wharf. This is merely an outline of my figure. That is merely the head of an arrow, showing the distance where the measures are.

Q. That represents the edge of the wharf, so to speak?

A. Yes, sir; this is the edge of the wharf right here (indicating).

Q. When you went into the water did you go from the wharf or from a scow?

A. From a scow.

Q. From the outer edge of the scow?

A. Yes, sir.

710 Q. What was the width of the scow?

A. Twenty feet.

Q. Will you state if, anywhere in front of the wharf or the scow from which you went, you found a rock four or five feet high and five or six feet above the bottom, and eight or ten feet on the back, within five, ten, or fifteen feet of the scow?

A. I found a three-foot-square rock there. It was on a bank there that runs up very high towards the wharf.

Q. That is the one that is marked here as being on the left?

A. Yes, sir; a stone three foot square.

Q. And you have marked here every one of the rocks which you found?

A. Yes, sir.

Q. And every one which was there?

A. Yes, sir.

Q. Have you ever had any experience in loading or unloading boats or in raising boats that have been sunk?

A. I have had experience in raising boats that have been sunk, but in loading I have not, except my own, when I have anything of that kind to do. I have loaded my own boat with machinery that I have taken out of wrecks, and when I thought I had enough of a load on I went in. I have loaded them and unloaded them and went back to the wreck.

Mr. WILSON: We offer in evidence this sketch, which the witness identifies.

Mr. HAGNER: I object to the introduction of this sketch  
711 in evidence on the ground that it has been based, as the captain has already stated, and as his answers with reference to it show, upon the principle or theory that the Aqueduct bridge lies to the north of Mr. Smith's bins or wharf, whereas the captain has since corrected himself and has found that the Aqueduct bridge lies to the west thereof, and therefore any one reading the testimony and not familiar with this characteristic of the map would be misled.

I also note a general objection to the map and to this testimony on the ground that it is rather late in the day to dispute the question of a rock being there, since a vessel has been lost upon it, and that it would have been far more advantageous for the respondents in this case to have made such a map before they ever let a vessel come in there rather than at so late a day as this after a vessel has been ruined and sunk on the rock.

As to the question where this rock is, it has been made too plain by the injury to the vessel as to where it was to have any further question about it.

(The above-mentioned sketch is filed herewith, and is marked Respondents' Exhibit J. W. No. 1, and will be found at page 335.)

By Mr. WILSON:

Q. There has been introduced in evidence a kind of a structure or model purporting to show a rock that was found six or eight feet from the edge of the scow lying alongside of the wharf, the rock  
712 being described as being twenty or thirty feet long, eight or ten feet on the top, and five or six feet high above the bottom. Did you see any such rock in that situation?

A. No, sir.

Q. Who assisted you in making this examination?

A. My tender and diver.

Q. What is his name?

A. Joe Patry.

Q. The sketch that you made has been platted and drawn to a scale, which we will prove. I wish you would examine this and state—

Mr. HAGNER: I note an objection to the exhibition of that drawing before the commissioner until it has been shown that it has been reduced to a scale by the man who made it.

By Mr. WILSON :

Q. State if you recognize this as being a correct representation of what you found, with reference to distances and the depth of the water.

A. If the scale is made to my measurements, I admit that all the objects are in their place.

Q. Tell me if the distances of these objects which you found, which are marked on your sketch, are the same as indicated on this map?

A. Yes, sir; they are correctly marked.

Cross-examination.

By Mr. HAGNER :

Q. Do you know the matter in dispute in this case? Do you understand it?

713 A. Mr. Smith? Yes, sir.

Q. Do you know what the question is in litigation here?

A. I have heard something of it; yes, sir.

Q. What is it?

A. In regard to a boat breaking in two.

Q. Are you familiar with docks and berths?

A. Yes, sir; around in my own locality. I am not much familiar with them down here.

Q. How does a man who wants to get his berth to a certain depth—when he wants to sound it and find out how deep it is already, do it?

A. He takes a lead line and sounds to suit himself, either in a row-boat or off the dock.

Q. Does he sound in the way you have indicated, by using a series of circles?

A. This is for a diver.

Q. I am talking about a man who has nothing to do with diving. Suppose a merchant owns a wharf, or suppose he has just purchased a dock and wants to prepare that dock and wants to measure to find out how deep it is, how does he go about measuring it?

A. I don't see that he needs the services of a diver at all.

Q. I agree with you there. What is the ordinary way of doing that?

A. Going out in a row-boat and taking soundings in front of his dock.

Q. Do you know what a sweep is?

714 A. Yes; I know what a sweep is.

Q. Did you ever see them sound with a sweep?

A. There are different kinds of sweeps to do it with.

Q. What is a sweep; how do they make them?

A. A sweep is to find out if there is any obstruction, and is made by using either a chain or a line weighted, and then one man on the dock and one man in a boat pulls up and drags the line along. That is always done from the top, if they don't want to go to the expense of getting a diver.

Q. Is it a difficult thing to ascertain the depth of the water in front of a berth?

A. You can ascertain the depth of the water in that way.

Q. Is it a difficult matter to do at all? Is it not an every day matter, and is it not easy enough to do?

A. It is an easy matter to jump in a boat and take soundings.

Q. Such a wharf as this, I suppose, could be sounded by one man or two men in the way that you have just indicated in an hour or two, could it not?

A. By taking soundings; yes; it is no trouble at all.

Q. Then you would find out the depth all over it in an hour or two, and there would be no trouble about it, would there?

A. I don't know how they would get at it. I suppose they would go there and do the thing in less time than that, if they knew how to go at it.

Q. It is a very easy matter to discover, if a man wants to find out what water his dock draws?

A. How much water he draws; yes.

Q. Suppose he puts a dredger in there and wants to deepen his dock, and the dredger gets through dredging, and then he wants to know how much water he has in there; what does he do then?

A. He takes soundings with a sounding pole or a sounding line.

Q. Either a sounding pole or a sounding line. That wouldn't take any longer than to take the soundings before the dredging was done, would it?

A. Of course not.

Q. Will you take the plat that you produced here as Respondents' Exhibit J. W. No. 1, and will you be kind enough to mark on it, as you now wish to be understood, the directions of the compass?

A. I can't do it yet. I am not long enough here in Washington, D. C., to know my compass. The way the river runs has kind of swung me around a little, and I haven't studied the compass.

Q. The derrick that you have indicated here is which derrick? It has been testified here that there were two derricks—one at or near the up-river end of the wharf and one down at the lower part or down-river end of the wharf. I want to ask you which one this is.

A. I only know one—the one that is the large derrick on the upriver. That is the only one I know of, and that is the one.

716 Mr. WILSON: I object to the question, because it assumes that there were two derricks. Two derricks have not been testified to, but only one derrick and a hoist.

By Mr. HAGNER:

Q. Now, Captain, it has been testified, as admitted by counsel for the respondents, that there is one derrick and a hoist there. There is a hoist situated at one end of the wharf and a derrick situated near the other end of the wharf. I want to know which one you mean, which derrick you mean when you speak of it here. I want

to know whether it is downriver from the bin, as you call the elevator here—that is, what you mean by the bin here?

A. Yes; the bin.

Q. Is it down the river or up the river from the bin?

A. Which way do you call down?

Q. Towards Washington is down the river.

A. It is down the river.

Q. I only want to get it located right. I don't want to mix you up the slightest in the world. The derrick is towards Washington?

A. Yes, sir.

Q. From the bin?

A. From the bin.

Q. You say the scow on which you stood was twenty feet wide?

A. Yes, sir.

Q. Where was the single scow there that you speak of? Will you be kind enough to state where on that map you would indicate as the position of that scow?

717 A. Right out there (indicating).

Q. Out from what point?

A. Right opposite the bin, where I went down.

Q. Where was that?

A. Twenty feet from the derrick.

Q. Twenty feet up the river from the derrick, and which end of the scow was located at twenty feet up the river from the derrick?

A. The down end.

Q. The down end of the scow?

A. The down end.

Q. Then the down end of the scow—

A. Is the one I got off of.

Q. Was the one that you stood on, you say, when you sounded?

A. Yes, sir.

Q. How long was the scow?

A. I should judge it was about fifty or sixty feet or somewhere in that neighborhood.

Q. Fifty or sixty feet long?

A. Yes, sir.

Q. That would take you up to about what position on the map; how far from the bin?

A. My ladder was fastened on one end of it.

Q. On the east or down-river end?

A. On the down-river end. We made fast to the wharf and caught on the piles, so that the scow didn't lay exactly—we didn't  
718 go exactly by the scow, but we went by the piles that were laying on the dock, and that is what gave us our location.

Q. The scow was in motion?

A. No, it wasn't in motion.

Q. Was it fastened to the shore?

A. To the pile.

Q. To two piles?

A. Yes, sir.

Q. Will you be kind enough to tell me how far out the inner side

of the scow was from the wharf when you took the measurements? Was it five or six or seven feet or one foot?

A. It was somewhere around thirty or forty feet.

Q. From the wharf, the scow was?

A. No; the side of the scow was alongside the dock.

Q. How far was it?

A. Twenty feet.

Q. You don't understand me. I want to ask you how far the inner side of the scow, the shore side of the scow, when it was lying there as you speak of—how far was the inner side of the scow from the dock as it lay there? Was it one foot or five feet or three feet or ten feet?

A. From the dock?

Q. Yes, sir.

A. A couple of feet.

Q. Then, as I understand it, the end of the scow where you had your ladder was about where the 35 mark is there (indicating)?

719 A. Somewhere around there.

Q. Just about the "35," you would say, and it was twenty feet from the derrick?

A. Twenty feet from the derrick, and thirty-five is the measurement from the dock.

Q. What does that (indicating) represent?

A. Three feet square.

Q. That three-foot-square rock is thirty-five feet from the dock?

A. Yes, sir.

Q. Then you put your ladder down from the scow, and in doing that your ladder must have been very nearly to what you have got there marked with the figure "35" and an arrow pointing from it?

A. No, sir.

Q. About where on that map would you have been? Just take a pen and show me.

A. I would lay my scow here, anywheres at all—right here, anywheres at all (indicating). I don't go exactly by my arrows and my marks. I lay my scow in position, and from here (indicating) I throw my sound-line, and by making my signal, and when I come to this object and get over it, where I stand my air bubbles shows the location of the rock, and the distance of the other scows that were here—there were four of them—give us the distance south, and then we measure the distance out to the derrick.

Q. Four of these scows that you speak of were below the derrick?

720 A. Below the derrick?

Q. Down the river from the derrick?

A. Loaded with rocks; yes, sir.

Q. Four scows abreast down the river and east of the derrick, I will assume, because it is the fact?

A. Yes, sir.

Q. These four scows that you speak of were put just below the



derrick opposite to the wharf, one beginning close along the wharf and running out abreast of each other—four scows?

A. Yes.

Q. You went down from where?

A. Over here. We shifted out several times.

Q. You shifted your single scow several times?

A. Yes, sir.

Q. And your measurements were given on the basis of these various four scows?

A. Four scows this way (indicating) and our measurements—yes, sir.

Q. Will you just mark "scow" in lead pencil on there (indicating on the map)?

(The witness marks the sketch as requested.)

Q. And those were twenty-foot scows?

A. Yes, sir.

Q. Where did those scows come from?

A. They were loaded with stones.

Q. Do you know anything about them? Where did you get them?

721 A. They were there.

Q. They were there?

A. They were there—fast there.

Q. Loaded with stones?

A. Yes, sir.

Q. And you measured them?

A. No, sir.

Q. How did you know that they were twenty-foot scows?

A. This scow I was on was twenty feet, and they are all the same width.

Q. Who said that?

A. Why, I say so.

Q. Did you measure them?

A. Well, I am not much of a poor guesser on the beam of a scow.

Q. You actually did not measure them, however?

A. No, sir.

Q. Did you measure the width of the scow, of the single scow, that you were shifting back and forth?

A. No, sir.

Q. Captain, when you speak of working at Winship point you mean down there where the canal runs into the river, do you not, where there was a washout there?

A. No, sir; right in a lock.

Q. So I say; and something has got the matter with the lock. It is at the mouth of what we call Rock creek. Do you know enough about it to know that?

A. No, sir; Winship point is all I know.

722 Q. That is what we call the mall down there. Mr. Winship's office is on what we call the mall, a point that runs  
51—582

out, and the lock is right near it. Do you know where the works of the Washington Gas and Light Company are there?

A. Yes, sir.

Q. That is the place you mean when you speak of Winship point. There is no such place here as Winship point; it is really at the mouth of Rock creek. Mr. Wilson will admit that.

Mr. WILSON: Yes, sir.

Mr. HAGNER: It is admitted that the lock that the captain speaks of as Winship point is at the mouth of Rock creek.

The WITNESS: It is inside the lock where I work.

Mr. HAGNER: It is inside the lock where he works, wherever that is.

By Mr. HAGNER:

Q. Captain, I am going to read you a little testimony of a man who went down there before—a diver. I am going to ask you first whether you noticed a great deal of rock dust—you know there is an elevator there and a crusher, a stone-crusher, that crushes stone up there, and there is a great deal of dust that falls into the air on to the water. I want to ask you if down there on that bottom you found a great deal of stone dust—you might call it fine stone or fine dust.

A. No, sir.

Q. You did not find any there?

A. No, sir.

Q. What was the substance you call silt?

A. A settlement of the river—a settlement of water——

723 Q. A deposit of water?

A. The deposit of water.

Q. And as distinguished from——

A. Clay.

Q. A deposit of fine stone dust?

A. No, sir.

Q. I say, as distinguished from that, you could tell the difference?

A. Yes, sir.

Q. You could tell that it was not stone dust?

A. Yes, sir; because you would sink right in it.

Q. Would you not do that with fine stone dust?

A. No, sir.

Q. Have you had any experience of that sort?

A. Yes, sir.

Q. Could you tell?

A. Yes, sir; I could tell the nature of the bottom where I am traveling over it, when I am on it.

(Counsel for the complainant thereupon read to the witness the testimony of Charles J. Pierson, a witness heretofore examined in this cause, beginning at page 83 and ending with page 89, as follows:)

724 By Mr. HAGNER:

Q. Now, Captain, from the description of the rock that you mentioned as being sixty feet from the wharf, it is, as given by you, very similar in shape to the one shown in this model—that is to say, its length, the trend of its longest part, northeast and southwest trend and its breadth—but you have stated it as sixty feet, whereas the captain of the schooner, in my presence, while the diver was down, as you have heard read here, put a pole on the rock, and, a measurement being then taken, it was shown to be between forty and forty-five feet from the wharf, straight out, and a very short distance below the point which you have marked as the position of the bin. Now I ask you if it should turn out that the four scows which were loaded, as you say, with rock should be but eighteen instead of twenty feet, would that account for the difference between your testimony and the testimony of the diver who went down before?

A. No, sir.

Mr. WILSON: Before you answer that note an objection to the question as being a mixture of statement and of argument. It assumes testimony to have been given that has not been given at all, and it cannot be used in this way in questioning the witness.

Q. I understood you to say that your measurements were based on the fact that those scows were twenty feet each. Was that correct?

A. Yes, sir.

725 Q. If they were not twenty feet, but were eighteen feet wide, would it not make the distance of the rock which you have stated was sixty feet from the dock less?

A. Yes, sir.

Q. You say it would make it less?

A. If the scows were shorter than twenty feet, it would make it less.

Q. You mean if they were narrower than twenty feet?

A. Yes, sir.

Q. Are you familiar with the various rivers of the country, so that you could say whether or not the tide which arises in the Potomac river at Washington is at a further point from the source of the river than any other river in the United States?

A. No, sir.

Q. You do not know whether that is correct or not?

A. No, sir.

Q. Have you ever been up and down the Potomac river?

A. No, sir.

Q. You know that it is quite a narrow river at Georgetown, do you not, and widens out down below the Long bridge? Do you know enough about it to know that?

A. No, sir.

Q. You do not know about that?

A. No, sir.

Q. Were you sufficiently familiar with the tide at Washington to

know whether it was high or low tide at the time you did your soundings at twelve o'clock noon on November 18, 1894?

A. I do not know how high it would be or how low. I do not know, for I kept no regular mark.

726 Q. You do not know the extremities of the tide?

A. No, sir; I do not.

Q. You know, however, that it was not low tide?

A. I do not remember whether it was low or not.

Q. Do you know the rise and fall here?

A. Yes, sir.

Q. About what is it?

A. Well, it is so irregular I do not know what time it rises and falls; it changes.

Q. Do you know whether that is caused by the narrowness of the river, and caused by the fact that it is so far from its source to the mouth of the river?

A. Well, that is something new to me.

Q. Is it?

A. Yes, sir.

Q. You do not know the general course of the Potomac, how it runs, do you?

A. No, sir.

Q. And you cannot tell in feet the difference in the tide?

A. No, sir.

Q. And you cannot tell in feet the difference in the tide?

A. No, sir; except I make it a business to put out a stake.

Q. At any one time you could tell by putting out a stake and marking it; but did you do that on this occasion?

A. No, sir; I just marked the time of the day and the hour of the day, knowing that the tide was published.

727 Q. Are you aware that there are six tides in the Potomac river, between its mouth and Washington?

A. No, sir.

Q. Do you know of a river in the United States where the tide ebbs and flows more than one hundred and thirty miles from its mouth?

A. No, sir.

Q. Did you ever hear of one in the United States that did that?

A. No, sir.

Redirect examination.

By Mr. WILSON:

Q. Mr. Hagner has read to you the testimony of a witness examined on behalf of the libellants in this case and his description of a rock that he is said to have found off of Smith's wharf, and has shown you a model of a rock. Did you see any such rock as that?

A. No, sir.

Q. Anything resembling it?

A. No, sir.

Q. On your sketch the rock that is marked as being sixty feet from the wharf is marked as being a flat rock.

A. Yes, sir.

Q. Does that description apply to the whole surface of the rock?

A. It is a flat rock, entirely flat.

Q. What kind of a rock was the one adjoining it, further out?

728 A. Flat, only less water on it, and a little lower—about two feet difference.

Q. Do you remember the location of the bin on the wharf?

A. Yes, sir.

Q. Will you describe the kind of bottom that there was in front of that bin and at sixty feet from the bin?

A. All small riprap.

Q. Here I am talking about—here (indicating).

A. Oh, mud and silt.

Q. Mud and silt?

A. Yes, sir; and sand and mud—that is, nearer the channel, because there is a continual wash there, and it leaves sand.

Q. And in front of the bin, how far did you go out?

A. Ninety feet.

Q. That was as far as you went?

A. Yes, sir.

Q. Ninety feet. Was there any rock whatever?

A. No, sir.

Q. As you made your descent into the water did you shift the scow up the river?

A. Yes, sir; shifted it four times.

Recross-examination.

By Mr. HAGNER:

Q. Captain, from the derrick to the lower end of the bin is how many feet? You have got it marked there?

729 A. Seventy-six feet.

Q. Seventy-six feet?

A. Yes, sir.

Q. From the derrick to the bin?

A. Yes, sir.

Q. The rock known as the sixty-foot rock from the wharf is just below the bin, is it not?

A. That is forty-five feet from the derrick.

Q. Forty-five feet from the derrick, and how far from the bin?

A. Thirty-one feet.

Q. Thirty-one feet from the bin?

A. From the bin.

Q. The point that you measured—the sixty-foot point from the wharf—then, was, you say, thirty-one feet from the bin?

A. From the bin?

Q. The rock that was opposite the second rock which I have spoken of as being similar to the one which our diver found. I say

I speak of it as being similar. Now, I want to ask you what this second line indicates here.

A. That is the wharf.

Q. That second line is the wharf?

A. Yes, sir.

Q. Exactly. Then there is only about a foot from the out front of the bin or elevator—am I right in calling that bin the elevator? Is that what you mean—the bin and the elevator are the same, are they? You have got it marked so on this other plan.

730 A. I do not know what they call it. It is the bin.

Q. The place where the stone is deposited; is that what you mean? This is Libellants' Exhibit No. 8 Wise, and this shows the upriver side of what you call the bin and I call the elevator.

A. Yes, sir.

Q. Do you recognize it?

A. Yes, sir.

Q. You recognize Wise No. 8 and you recognize that—just put the word "bin" as you mean, please; just mark it with a pen.

A. Well, I do not know what you would call it.

Q. That is a good name for it; that is as good as "elevator."

Q. What do you want me to mark?

Q. Just say "bin"—"b-i-n," right there, on that post there, part of the bin.

A. Any objection?

Q. B-i-n; that is the upper end.

Mr. WILSON: There is no dispute about it. There can be none unless you make it.

A. If that is spelt right that is it.

(The witness marks the plat as requested.)

Q. Here is what you call the derrick in Exhibit Wise No. 9. Do you recognize it?

A. Yes, sir.

Q. Do you recognize the chute coming out from the bin in Libellants' Exhibit Wise No. 9?

731 A. Yes, sir.

Q. Do you see the chute?

A. Yes, sir.

Q. You recognize that and the place, do you not?

A. Yes, sir.

Q. Now, this is the derrick you speak of; is it?

A. Yes, sir.

Q. Will you mark "derrick" on that place in ink—"d-e-r-r-i-c-k"?

The WITNESS: It is so.

Q. Now, this wharf line which you say is the second line out, is how far from the bin? Do you know?

A. No, sir.

Q. You do not know?

A. No, sir.

Q. How far it is out from the bin?

A. No, sir.

Q. Well, that has already been testified to here.

A. It seems to me, though, it is all built over the wharf. The structure seems to be over the wharf. I do not know. I do not remember.

Q. It has already been testified that it is only a foot from the wharf line. There is the wharf line, you see.

A. Yes, sir.

Q. Then that line is really only meant to be a foot—one foot; is that the idea?

A. No, sir; that is no line at all. These are only arrows.

Q. Oh, I see what you mean. I beg your pardon. I thought that was a line.

732 A. You see there are arrows up to this mark.

Q. I see those are all arrows that mark all the way across the parallelogram of the paper. That is the mark all the way across the parallelogram of the paper nearest the word "bin" in diagram No. 1. That is only a series of arrows, is it, and so indicated, and not meant to be a line?

A. That is only arrows; yes, sir.

Q. And the wharf line is the second one from the bin?

A. Yes, sir.

Q. The wharf line, then, is indicated by the second line from the bin?

A. Yes, sir.

Q. Did you go on this rock while you were down under the water—this second rock from the east?

A. While I was under water? Yes, sir.

Q. While you were under water you were on top of it?

A. Yes, sir.

JULIUS WANNER,  
By E. L. WHITE, *Sp'l Com.*

JOSEPH PATRY, a witness of lawful age, called by and on behalf of respondents, having been first duly sworn, is examined—

By Mr. WILSON:

Q. What is your name?

A. Joseph Patry.

733 Q. Your age?

A. Forty-six.

Q. What is your occupation?

A. Diver and assistant.

Q. Diver?

A. Yes, sir.

Q. How long have you been engaged in the business of a diver?

A. Oh, I have been diving different times; not steady.

Q. Where are you employed now?

A. I am employed at Winship point, what we call it.

Q. How long have you been working there?

A. About fourteen or fifteen days, I think.



Q. Did you assist Mr. Wanner in making the examination of the bottom of Smith's wharf, in Georgetown, on the 18th day of November last?

A. Yes, sir; I was attending him.

Q. What were your duties? What did you do?

A. To take the location, mark the location, when he gave me the signal that he found some object there when he was down.

Q. And how did he give you the signal?

A. With the life line.

Q. Then what did you do; how did you make that measurement?

A. I make the measurements with the scows that were alongside the dock. There were four scows there.

Q. And the distance of the objects that he found from the edge of the wharf. How did you indicate them or measure them?

734 A. From the derrick?

Q. With respect to the edge of the wharf?

A. Yes, sir.

Q. Did you yourself afterwards go down in a diver's suit and examine the bottom?

A. Yes, sir; I was down.

Q. When?

A. A week ago, the 25th; it was on Sunday, a week ago last Sunday.

Q. What examination did you make?

A. I went down all over the the ground and took sweeps the same as the captain done.

Q. Examine the sketch that is in evidence, marked J. W. Bo. 1, and state what you know of the proportions of that sketch.

A. Yes, sir.

Q. Did you know that it was prepared and by whom it was prepared?

A. Oh, it was made by Captain Wanner. After he was down for a little while he came up, and I would give him the measures and he put them down in his book, and he made the map himself.

Q. How many times did he go down and come up to make report?

A. Four times.

Q. Four times?

A. Yes, sir.

Q. And when he came up each time did he make a record of what it was?

735 A. Yes, sir; he made a record.

Q. Will you state whether that sketch, with respect to the distance of the various things that are marked there on the wharf, is correct according to your own personal observation?

A. Yes, sir; according to the measurements I made there they are correct.

Q. Did you find any other rocks except those that are marked on that sketch?

A. No, sir; I found some small rocks, but not to amount to anything.

Q. You have heard read here the description of a rock alleged to have been found by Mr. Pierson, a diver, near the wharf. Did you find any such rock there or see any such rock?

A. No, sir; I did not find anything about that at all.

Q. With reference to the point marked on this sketch as the bin, and going out ninety feet from the bin on the bottom, state if there was any obstruction at all directly in front of the bin.

A. No, sir; except away out.

Q. And what was the character of the bottom, marked here "mud"?

A. It was a kind of a mud, and I found a place where there was a little sand and a few broken stones.

Cross-examination.

By Mr. HAGNER:

736 Q. Captain, if as testified by the witness who examined this rock and who went down for that purpose, it appears that the rock which put the hole in the bottom of the Ellen Tobin some seventeen feet wide was situated below the bin that Mr. Wilson has just spoken of, it is not at all remarkable if there should be no rocks opposite the bin, is it?

A. Well, there is a few small rocks, but not to amount to anything; not any rocks of that description.

JOSEPH PATRY,

By E. L. WHITE, *Sp'l Com.*

ISAAC R. BOWEN, a witness of lawful age, called by and on behalf of the libelees, having been first duly sworn, is examined—

By Mr. WILSON:

Q. State your name, your age, residence, and occupation.

A. I am about fifty-four; my occupation is book keeper and assistant superintendent in the employ of Charles G. Smith & Son; residence, Anacostia, D. C.; my name is Isaac R. Bowen.

Q. How long have you been in their employ?

A. I think it will be four years this coming April.

Q. What was your occupation before you were in their employ?

A. Well, I was in the employ of Mr. Gilbert, their predecessor in that business.

Q. Were you ever the harbor-master of the port of Washington; and, if so, when?

737 A. I was during the war, from 1862 to 1864, inclusive, about two years; I was under the Government—appointed by the Government during the war—that is, I was not commissioner—I was employed by the Government to perform that duty. In answer to your question as to what my duties were or have been, with the exception as stated of being with Mr. Gilbert, the greater part of my lifetime has been in connection with the water as mariner, mate, and master, and so on.

Q. Do you know the average rise and fall of the tide at Georgetown?

A. Well, I should say that it varies from one and a half to three feet as near as I can state.

Q. You knew of the sinking of the schooner Ellen Tobin opposite Smith's wharf?

A. Yes, sir.

Q. You knew of her being taken to Alexandria?

A. Yes, sir.

Q. State if you saw the schooner after she was taken to Alexandria and when and where and if you saw her bottom.

A. I did, sir; on the railway at Alexandria on the 3rd day of January, 1894.

Q. Describe the condition of the bottom of the vessel when you saw it.

A. Well, the vessel was out on the railway, and I do not think there was anything done to the vessel in the way of repairs when I saw her; there was something of a hole in her bottom, and I made a little sort of an examination of the vessel's bottom generally.

738 Q. State what you found in respect of weak or soft spots in the vessel's bottom.

A. Well, I noticed that there were several butts that were very open, both forward and aft of the hole, or whatever you term it, that was made in the vessel by some obstruction that she had been in contact with. There were butts and seams that were open. I noticed one seam on the port side about amidships, just on the flat of the bilge, as we term it, I should say running some six or eight feet long. I did not measure it, but I should judge it ran about that length. That was very open and it was filled up with mud and mussels. I took and picked out several of the mussels myself, out of the seam, and there appeared to be no oakum in it. Of course I did not pry it with a knife to open it, but it showed from observation, without probing it, to be an open seam.

Q. Did you see any spike-holes?

A. No, sir.

Q. Or soft spots?

A. No, sir; I cannot say that I did. What I noticed particularly were the butts where the planks came together. They had very little or no oakum in. They were entirely open, that is—not in connection with the break; I mean at different parts of the vessel's bottom, both fore and aft.

Q. State if you saw any soft spots on the port side.

A. Well, this place I speak of, the seam was soft and had the appearance of having been done by ice, or it might have been done in running over some iron or something like that near the wharf, where it had gouged the oakum or the wood out for that  
739 length, and it had made a very wide seam of it, and the edge of the seam was rotten or soft. That is the place that I referred to in speaking of the open seam.

Q. Did you form any opinion as to the length of time that seam had been open or the edges soft? And, if so, state how long.

Mr. HAGNER: I object to that on the ground that it had been

six months or nearly that (more than five months) since the vessel had been sunk on a double rock, and that the opinion of the witness on such a subject at such a time could not be of any value for any purpose.

A. Well, my impression or the impression given to me then was that the soft place or the seam referred to had been there a considerable time before the vessel met with that mishap. As to how long—what I mean to say is that it was not incidental to any mishap that was caused there, if that is the way to put it.

Cross-examination.

By Mr. HAGNER :

Q. Is it not very remarkable that when a hole seventeen feet wide and a break in a vessel thirty-six feet long has occurred that there should be some sprung butts about the vessel, is it?

A. No, sir; not when in proximity to that break.

Q. It would not, if a timber in a vessel on the outside skin of the vessel was fifty feet long, be very remarkable if the injury had occurred on a rock thirty feet from a butt that the butt should be sprung, is it?

A. How is that?

740 Q. It would not, if a timber in a vessel on the outside skin of the vessel was fifty feet long, be very remarkable if the injury had occurred on a rock thirty feet from a butt that the butt should be sprung, is it?

A. Well, it would in this case because the spot that I speak of had no connection with the break whatever. It is not in a direct line.

Q. Suppose there had been another rock in that berth that she had settled on, would it be very remarkable that there should have been another butt sprung?

A. If that had been so in this case the top of that rock would have been above the water.

Q. I am not talking about the rock. I say if a vessel sunk in a berth with a half a dozen rocks in it, it would not be very remarkable when she has met with such injuries that a butt should be sprung in another part of it, would it?

A. I should say it was. It would be remarkable in a case where the vessel was sunk and there was no motion of the sea or in a cove laying perfectly still, as she was. It would not be unreasonable if it was in a sea and exposed on a lee shore beat about by wind and wave and the vessel making motion, but it would be, in my opinion, in perfectly still water.

Q. Suppose that vessel had sunk on two rocks—that she had sunk on the big rock and swung on that for a month or two, and that in settling she had come down on another rock—would it be remarkable that she should spring another butt from the first place of injury?

741 A. Well, I do not know that it would, necessarily.

## Redirect examination.

By Mr. WILSON :

Q. Mr. Hagner has inquired of you about a hole in the bottom of a vessel seventeen feet wide and thirty feet long. Did you see any such hole as that ?

A. I did not.

Mr. HAGNER : I did not say a hole thirty-six feet long. I said an injury thirty-six feet long.

A. I did not.

Q. Did you see an injury thirty-six feet long ?

Mr. HAGNER : An injury for the space of thirty-six feet, if that will be more definite.

A. I did see an injury in the vessel that might have been ten or twelve feet long or fifteen feet in length and partly across the keel of the vessel, but I saw no hole or anything of that description.

Q. How far across the vessel did the break continue ?

A. Well, I should say that it ran about—I do not know really ; perhaps it might have been five feet, or some such matter.

Q. Did it show anything except a break in the keel ?

A. Well, I do not even know that I noticed a break. It was sprung—that is it.

Q. Burst up ?

A. Yes, sir ; burst up ; a general shoving up of that would express it.

## 742 Recross-examination.

By Mr. HAGNER :

Q. Does it look anything like the photograph I hand you, called Libellants' Exhibit No. 10 ?

A. No, sir ; I cannot say that I recognize much of a similarity—that sort of a break.

Q. Being a mariner, Captain, you recognize a vessel when you see it ?

A. Yes, sir.

Q. You know what that is that you see there ?

A. Yes, sir.

Q. Does it look like a vessel to you and a vessel that has been injured ?

A. Yes, sir.

ISAAC R. BOWEN,  
By E. L. WHITE, *Sp'l Com.*

The further taking of these depositions was thereupon adjourned ; subject to notice.

E. L. WHITE, *Sp'l Com.*

743

WASHINGTON, D. C.,  
*December 13th, 1894—8 o'clock p. m.*

Met, pursuant to notice, at the office of Nathaniel Wilson, Washington, D. C.

Present on behalf of the libellants, Mr. Hagner.

Present on behalf of the respondents, Mr. Wilson.

Whereupon JOSEPH H. LEE, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined—

By Mr. WILSON:

Q. Mr. Lee, you have already been sworn in this case, and you were examined as a witness on behalf of the libellants, were you not?

A. Yes, sir.

Q. How long have you been in business in Georgetown?

A. Eighteen years.

Q. Where?

A. At 3228 and 3236 Water street.

Q. How near is that to Smith's wharf—the wharf now occupied by the Smiths?

A. It is right on the wharf.

Q. On the street?

A. Yes, sir.

Q. What knowledge had you during that time of the arrival of vessels at that wharf and their being loaded and sailing from there?

744 A. I saw them come in there and unload and go away.

Q. Had you any duties to perform in respect of reporting their arrival?

A. We have reported to the New York Herald for ten years past.

Q. Can you give any idea of the number of vessels during that time that you saw at Smith's wharf or at that wharf?

A. No, sir; I couldn't form a correct idea as to the number.

Q. A very considerable number?

A. Yes, sir.

Q. State if you know of any vessels having been damaged while lying at the wharf or approaching it or departing from it.

A. I don't recollect any except the schooner Francis R. Baird.

Q. What happened to her, and when?

A. In December of 1882.

Q. 1882 or 1892, do you mean?

A. 1892. She loaded stone there at that wharf, and the captain claimed that his vessel laid hard in the berth.

Q. Where did she lie?

A. She laid at what we call Smith's wharf now.

Q. State her position with relation to the position that the Tobin occupied at the same wharf.

A. It was at the same wharf. It might not have been in the

same position. It might possibly have been a little farther out or in from the wharf, but it was loading at his wharf.

745 Q. Did she get aground?

A. Yes, sir; she grounded there on a very low tide.

Q. What, if any, injury was occasioned to her?

A. I never heard what the injury was. The vessel went away.

Q. Did she get off immediately?

A. She got off and proceeded on her voyage.

Q. Loaded?

A. Yes, sir.

Q. Did she get off immediately?

A. No, sir; she laid there until the tide raised.

Q. Then she got off?

A. Yes, sir.

Q. Do you know how that low tide occurred?

A. From strong northwest winds in December.

Q. They made the low tide?

A. A very low tide; yes, sir.

Q. Do you know anything of the age of the Baird?

A. Only that she was an old vessel. I don't remember her age.

Q. After the Baird grounded there what was done to the berth? Do you know?

A. This was in December. The next spring they dredged the dock out.

Q. The Smiths dredged the dock out?

A. Yes, sir.

Q. By whom was it dredged out?

A. By Summers—Fred. L. Summers.

746 Q. After the Tobin sank were you present at any conversation between the captain of the Tobin and Summers, and do you know of any examination as to the position of the vessel being made by Summers at that time?

A. Mr. Summers came in my place after the Tobin sank, and as I saw him coming I said to the captain of the Tobin, "There is the contractor who dredged this wharf," but I didn't introduce him to him. I said, "Mr. Summers, we have a vessel sunk out here."

Q. That was in the presence of the captain?

A. Yes, sir. He said, "I see"—

By Mr. HAGNER:

Q. After the damage was done, was it?

A. Yes, sir.

Mr. HAGNER: I object to all this on the ground that it is utterly immaterial what the captain said to Mr. Summers or what Mr. Summers said to the captain after the sinking of the vessel.

By Mr. WILSON:

Q. Did Summers, as a matter of fact, make an examination—

Mr. HAGNER: Wait a minute. Ask him what he did do.



By Mr. WILSON :

Q. What did Mr. Summers do with relation to the examination of the Tobin and her position?

A. I asked Mr. Summers how much water there was out there, and he said fourteen feet, and in some places fifteen. Said I, "How do you account for this vessel being sunk there with less water?"

747 Mr. HAGNER: I object to that as utterly immaterial.

Nothing that Mr. Lee could say to Mr. Summers, even in the presence of the captain, after the sinking of the vessel, since he was no longer the captain of her then, could in any way affect the interest of the parties or be interesting or applicable to any one in this case.

By Mr. WILSON :

Q. Now, go on.

A. He said, "She can't be in the place that I dredged." Said I, "Go out and see." He went out to the wharf, made the examination and came back, and said, "The vessel is laying where I dredged."

Q. That was in the presence of the captain?

A. Yes, sir. Said I, "How do you account for her being sunk there?" Then he said, "I don't know."

Q. State if you know of your own knowledge of other vessels touching the bottom at that wharf.

Mr. HAGNER: I object to that on the ground that it has been shown that one vessel was injured there already, and should be sufficient warning for any one in his sound senses; it is utterly immaterial whether any other vessels were injured there or not.

A. I don't know of any vessels being injured there.

Q. Or touching?

A. Oh, yes, sir; it was a common thing to go -ground there on low tide.

Q. But none were injured?

A. None that I know of.

748 Q. Do you know how much water the Baird drew?

A. Not positively.

(Cross-examination waived.)

JOSEPH LEE,  
By E. L. WHITE, *Sp'l Com.*

WILLIAM J. McDERMOTT, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined—

By Mr. WILSON :

Q. What is your occupation, Mr. McDermott?

A. Shipwright.

Q. How long have you been engaged in that business, and where?

A. I have been in that business about forty-five years, I guess; maybe more.

Q. Where?

A. In the Washington navy yard the best part of the time, I judge; in Baltimore and all over the country—Philadelphia and New York.

Q. Where are you employed now?

A. I am living off the money I spent. That is about as near as I can tell you.

Q. You are not employed now?

749 A. No, sir; I am not employed now.

Q. Did you know the schooner Ellen Tobin when she was afloat?

A. I never knew her when she was afloat. The first I seen of her was when she was sunk.

Q. Where did you see her first?

A. At Smith's wharf, I judge.

Q. At Smith's wharf in Georgetown?

A. Yes, sir.

Q. Did you make any examination of her?

A. Yes, sir; I looked at her. Of course, I didn't make no particular examination of her. As far as appearances went when she was sunk there was very little examination to be done, except her deck being shoved out.

Q. Did you see her afterwards in Alexandria?

A. I saw her in Alexandria when she was overboard, and afterwards I seen her when she was hauled up for temporary repairs. I seen her when she was hauled up to make temporary repairs on her.

Q. Where was she hauled up when you saw her?

A. She was hauled up on Mr. Agnew's railway; it was known as that, I believe.

Q. Did you make any examination of her then?

A. Yes, sir.

Q. What was the examination you made, and what did you observe?

A. I looked around over her and seen what kind of condition she was in. The keel was sprung up on a straight line at that  
750 time—she was on a cradle, you know—about seventeen inches; that was by correct measurement.

Q. She was sprung up about seventeen inches?

A. Yes, sir. It wasn't a long spring; it was rather a short one.

Q. Where was that?

A. Just about under the centerboard, under the centerwell, rather.

Q. With relation to the keel and bottom of a vessel, what is her weakest part?

A. I should suppose the weakest part were about the centerwell for a vessel of that kind.

Q. Did you examine her whole hull?

A. Yes; I looked over the whole hull and I found, I suppose, some of the old original fastenings into her. One butt fastening on the starboard side, the after-butt of the forehood, that had a hole into it where the fastening was entirely eat up. I don't know how many more there was. There might have been more, but I didn't go over the whole thing at that time. There was a leak there; there is no question of that.

Q. Can you describe its appearance; how this weak spot looked?

A. It was just simply where the spike was drove through and the corroding of the salt water had eat it entirely up, right through.

Q. There was no spike there?

A. No, sir; there was no spike there.

Q. State if you found any holes, any places where the spike had been?

751 A. That is about the last holes that I saw, them on the port side. Forward her forehoods looked as if they had been calked; anyway, they was red-leaded, the seams were, and that wouldn't have been done if they hadn't been calked. Some of the ribs was calked and along the seams, but that was a long ways from any damage that was done the vessel.

Q. With reference to the well-hole state what weak spots there were and whether those weak spots were such as would, in your opinion as a shipwright, cause the vessel to leak.

A. The weak spots about her centerwell would not cause her to leak. That is naturally the weakest place, because the floor timbers don't run across the keel there, but still take it, I suppose, in one point of view, it wouldn't cause her to leak, not by her being weak there.

Q. But the other places?

A. The places that I speak of, forward and aft, was the forehoods. They wouldn't calk them, I suppose, without they had leaked—that is, they had the appearance of being calked. There was no doubt in my mind she was in a leaking condition. That might have helped her to sink, too.

Q. If the vessel had grounded on a rock or any obstruction six feet from the bottom and remained in that position any length of time, state whether or not the rise or spring would have been greater or less than you saw it.

A. It might possibly have been less when I saw it, because it is natural to suppose it would have sprung back some. That is only common sense, you know. I wouldn't like to state anything

752 that ain't common sense, but I don't think, though, that she got on any obstruction that was six feet above the other part of the bottom.

Q. Why? Give your reasons for that.

A. I think it would have showed in the bends. It would have affected the vessel's bends, and her bends didn't show any effects from the mishap that she had at all.

Q. Will you state what the bends are?

A. The bends are the upper planks around the ship, you know.

They are generally thicker than any other part of the vessel. I suppose you know that.

Q. The bends were not injured or bent at all?

A. They didn't show any defect at all from this mishap—the bends didn't. It was only in the bottom, from what I could see of it. There was nothing about the other part.

Q. Do you remember when it was you made that examination; what day, as near as you can state?

A. In Alexandria?

Q. Yes.

A. I think it was the 6th of April. It has escaped my memory exactly.

Mr. HAGNER: It was about that date. On the 5th of April she was put back on the ways.

A. Yes, sir; somewhere along there, I guess.

Mr. HAGNER: I wanted to make an objection to this on the ground that it was not until the vessel had been injured for the better part of a year that this examination in Alexandria that the captain made and speaks of was made, and therefore it could not possibly affect the question at issue here.

753 By Mr. WILSON:

Q. Could you form any opinion as to the length of time these holes or spots had been there?

A. Where it was corroded and eaten up?

Q. Yes.

A. I couldn't form no idea.

Mr. HAGNER: I object to that.

The WITNESS: I suppose it was from the time the vessel was built up to the present time. I don't know how old she was. Some said she was twenty years old.

Q. How long the spikes had been out you could not form any opinion?

Mr. HAGNER: That is objected to.

A. How long had the spikes been out to form that hole?

Q. Yes.

A. I don't know. I couldn't answer that.

Q. State it approximately. Was it months or years, or what?

Mr. HAGNER: Objected to as immaterial.

A. Even if it had been out only the night before it would have caused the leak, you know.

Q. But from the appearance of the hole what was the age of it?

A. From the appearance of the hole I suppose it was out maybe a month; maybe more or less.

Q. Did you see Mr. Berry there?

A. Yes, sir; and he seen the hole that I speak about, too.

Q. Did you see Mr. Smith call his attention to that?

754 A. Yes, sir.

Q. The Mr. Smith who is here and who is one of the parties to this case, is he the one you refer to?

A. Yes, sir.

Q. Did you see a place on the port side where there was a plank out?

A. Where the plank was out?

Q. Yes.

A. I saw a place on the port side when I was down there where the plank was cut out, of course.

Q. The plank was cut out?

A. Yes, sir.

Q. Whereabouts was that on the port side?

A. Just about abreast of the damage that was done to the vessel; just about abreast of the centerboard.

Q. Was it fore or aft of the centerboard?

A. As well as I can remember now it was just near about where the spring of the keel line was; somewh-res near abreast of that.

Cross-examination.

By Mr. HAGNER:

Q. You mean the spring of the keel from the injury?

A. The plank was cut out somewheres about the spring of the keel, as well as I remember.

Q. Did you mean by your last remark, Captain, the spring of the keel that every vessel has?

A. Oh, no.

Q. You mean the spring of the keel from the injury?

755 A. Exactly; that is it. A. *Exactly; that is it*; I think it was about abreast; I might be mistaken; I wouldn't like to state that positively because I might be mistaken about it.

Q. I mean the spring of the keel caused by the injury.

A. That is the idea; that is correct.

Q. Did you see her again after that visit?

A. No, sir; I never seen her after that visit.

Q. You never saw her after that?

A. No, sir.

Q. You don't know what had to be done in repairing her, do you?

A. No; of course not. Those that repaired her made an alteration in the vessel; they made an alteration in her from what she was when she came here.

Q. Did you see that? You know that is so, do you?

A. Yes; I knew that to be a fact.

Q. You know that they rebuilt her without any centerboard in her, do you not?

A. Yes, sir. I couldn't say that of my own knowledge either, but still I know it enough to swear to it. I ain't afeard that will conflict with my oath in regard to that matter. They made a keel vessel out of her, from what I know.

Q. You never had seen her until you got to Alexandria, did you say?

A. I never seen her until I seen her at Smith's wharf.

Q. You saw her at Mr. Smith's wharf?

A. Yes, sir. I was questioned about that at first. I think that was the first thing I stated.

Q. When she was sunk?

756 A. Yes.

Q. How long had she been sunk then?

A. That I couldn't tell you.

Q. Do you remember what time it was you saw her; what time in the month or year?

A. No; I do not, because I was not interested in the matter at all. I just went there merely for curiosity; that is about what carried me there. I didn't go there through the solicitation of any person at all; it was just my own visit.

Q. When you speak of the weakness of a vessel being at the centerboard well you mean that that is an inherent weakness in all vessels, do you not?

A. Exactly.

Q. In all vessels?

A. In all vessels.

Q. Where the well goes in is always the weakest point in any vessel?

A. In any vessel, of course.

Q. Where the well goes?

A. Certainly.

Q. And the reason of that is that the logs can't cross the well?

A. That is it.

Q. The bed logs can't cross the well?

A. That is it.

Q. You did not mean to apply that weakness in the waist to the Ellen Tobin particularly, but you meant to any vessel?

757 A. Certainly; that is familiar to pretty much every person, I suppose, that knows anything about a vessel.

Q. Did you notice how wide a rock the Tobin had been sunk on by the impression under her bottom?

A. I couldn't tell. It didn't show any size in any way.

Q. But she had at that time been overboard again?

A. I would suppose that whatever she was on—I don't know what she was on—whatever she got on, I suppose it was of a small size.

Q. She had been on the ways, temporarily repaired, red-leaded in some places, and put overboard in order to enable them to use the railway, and when you saw her she had again been put on the railway for permanent repairs. Was not that it?

A. That is it.

Q. If you have a vessel independent of this vessel we are talking about, one hundred and thirty-six feet long and thirty-two feet beam, a three-masted schooner, and you have her grounded on a rock which is seventeen feet wide and some thirty feet long, and she is loaded with four hundred tons of stone and breaks in two, all except her upper bends, and rests there on that rock, only having a gradual settlement, would not the fact of the mizzen-mast being, in

that case I speak of, on top of the rock tend to keep that vessel from sinking?

A. No, sir; I don't think it would.

Q. It would not?

A. No, sir; I don't think so.

Q. Would not the pressure of that stone itself on the rock help to keep the vessel from sinking?

758 A. The pressure of the stone on the rock?

Q. Of the crushed stone in the vessel. Would not the weight of the crushed stone in the vessel, the stone which is down in her hull, prevent her from going farther down, steady her? Would not that and the mizzen-mast together steady her and prevent her from going farther down?

A. It might for a time, but in the course of time I think it would go down. I think it would go down until it found a foundation. I think it might stand for a short time before she would go down, but then it eventually would go down. I don't think the obstruction she struck on was anything like six feet out of line from where her bow and stern came down on. I have no idea it was anything like six foot high.

Q. I will tell you what the captain says about that.

Mr. WILSON: I object to counsel stating what the captain said.

Mr. HAGNER: I know you do. That is the reason I am going to state it.

Q. Captain Hankins, the captain of the vessel, says that she settled on that rock, and that when she broke in two the bow rested on another rock at the bottom of the berth.

Mr. WILSON: I note an objection to that, as Captain Hankins did not testify to any such thing.

Mr. HAGNER: I state positively that he did state it, and I will risk this case and agree to dismiss the libel if Captain Hankins did not state it. You can put that on the record.

759 Q. How would that affect it, Captain?

A. She might have rested on one rock, and her bow and stern on another, or she might have rested on several rocks. It is a rocky bottom there, but I don't believe she rested on any rocks that projected, if it was a rock. I don't know whether it was a rock or not that pushed her centerwell up.

Q. Have you made centerboards for such vessels?

A. Yes, sir.

Q. There is a centerboard in that vessel thirty-six feet long.

A. I guess that centerwell—I mean the board alone—were twenty-six feet long, was it not?

Q. Twenty-six feet long; yes.

A. I guess twenty-six feet long and six or seven inches thick. That is generally about the thickness of them boards for them vessels.

Q. How long would it take to make a centerboard of that kind?

A. That depends on circumstances. It depends on everything.



There is a good deal attached to that question, and a person couldn't commence to answer that. It depends on what condition you would have your timber in—how you would get it—and all that sort of thing. It depends on the men that works on it. Some men would do a good deal more work than others.

Q. Now, with reference to the well. You did not mean to say that the well of the Tobin had any soft spots about it?

A. I didn't see any, but I will tell you—if you place any value on my opinion I will give it to you—my opinion is that the vessel was—

760 Q. Wait a minute.

MR. WILSON: Go on.

MR. HAGNER: No; I don't want that. I simply asked you certain particular questions, and I don't want any answer to anything else. I am too old a bird to take anybody's opinion who is on the other side, and I want that put on the record. I don't want your opinion on anything at all that is not asked.

THE WITNESS: I thought you did. You asked my opinion in regard to her setting on a rock.

MR. HAGNER: I know I did, and I don't want any more than just that, and I'm not going to have it, either.

THE WITNESS: That's the reason why I volunteered, because you asked my opinion about her setting on a rock.

Redirect examination.

By MR. WILSON:

Q. I want your opinion. In reply to a question asked by Mr. Hagner you stated that in your opinion the object on which the vessel rested when she sunk was a small one. Will you please state the grounds of your opinion?

A. My opinion is, from the indenture that was in the keel. That is what I give that on. I don't know whether that is exactly the correct answer or not.

Recross-examination.

By MR. HAGNER:

Q. Did you observe any other dents about the vessel?

A. Oh, no.

761 Q. You did not?

A. No, sir.

Q. You did not make a very careful examination of her, did you?

A. Yes, sir; I thought so. I thought I examined her very carefully about where that damage was done to her—right about the centerwell.

Q. Had any other planks been taken out of her when you saw her than that one?

A. Yes, sir; I think they were stripped from the keel, most of them.

Q. On the starboard side of the vessel, in her waist, had not some

eight feet of her timbers been taken off—had not her outside skin been taken off?

A. No, sir; not nowheres near about her waist nor neither any of her bends taken off. I was going down the river after that some time and I seen they had taken some of her bends out; but still that don't relate to the damage to the vessel; that was done in general repair, I think.

By Mr. WILSON:

Q. Did you know that wharf? Have you known it for years?

A. Yes, sir; I have known that wharf ever since I was a boy, and that has been a right smart while ago, I think. I built a tug-boat on that wharf for Mr. Gilbert—no; it was not. It was on the fish wharf—just above his wharf there.

WM. J. McDERMOTT,  
By E. L. WHITE, *Sp'l Com.*

762 CONRAD F. BENNETT, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined—

By Mr. WILSON:

Q. What is your occupation, Mr. Bennett?

A. Shipwright.

Q. How long have you been engaged in business as a shipwright and where?

A. I have been engaged in it about twelve years here. In 1861 I learned my trade, and I have been working at it since, off and on.

Q. Where did you learn your trade?

A. Philadelphia.

Q. With whom?

A. I learned my trade partly with Mr. Cramp—old man Cramp—and finished it with a man by the name of John Cooper.

Q. How long have you carried on your business in Washington?

A. About twelve years in Washington, I think.

Q. Did you ever see the Ellen Tobin; and, if so, when and where did you first see her?

A. I have seen her, but I never examined her until she was ashore up at Mr. Smith's.

Q. Did you examine her there at the wharf after she was sunk?

A. After she was sunk, yes, sir.

Q. To what extent was the examination?

A. I examined her to see as far as I could; you know she was sunk.

763 Q. You did not examine her below? You did not go down in the water?

A. I couldn't go down in the water. We could see her break-nose about the well. That is about all we could see about her.

Q. When was that?

A. That was along about in November, I think. It was some time in November, if I am right. I don't know exactly the time;

somewheres along there some time. I think it was after she was sunk.

Q. It was while she was there at the wharf?

A. Yes, sir.

Q. Did you see her afterwards?

A. Yes, sir.

Q. And, if so, where?

A. I saw her at Alexandria, on the railway.

Q. At what time?

A. I seen her there the fore part of January.

Q. Where was she when you saw her?

A. On the railway.

Q. Did you make any examination of her?

A. I did; yes, sir.

Q. Please state the result of the examination.

A. The result is, I saw the keel where it was up into her. It appeared to me to be—I never measured it with a rule—but somewheres in the neighborhood of twelve or eighteen inches; somewheres up there. It was close to eighteen inches. It might have been less or it might have been more. I also went around the boat  
764 to see what was into her. I saw a place on the port side of the butt, which was, I suppose, somewhere about three or four foot long; probably longer. That was open. It had started. It leaked.

Q. It was open?

A. Yes, sir; it was open; an old plank, I suppose. I also looked around forward and I seen aft, too, where the wooden ends was open, cracked. I suppose they was open, but they wasn't calked when I saw her.

Mr. HAGNER: To what?

A. Wooden ends, forward and aft.

By Mr. WILSON:

Q. Did you see any spike-holes?

A. I didn't see the spike-hole; no, sir. But I also went down inside of her. Then I saw her well and the bottom piece. I saw decayed wood into it. That is next to her bed-piece—one of the planks of the bed-piece.

Q. What was the condition of the bottom irrespective of this place at her well-hole in respect of her seaworthiness and tightness?

A. I can't say she was tight. As far as I could see about her, I think the vessel leaked at the wooden end and the planks that I saw on the port side of her.

Q. Was the keel broken?

A. It was sprung up. I suppose it was sprung up, as I told you.

Q. Were any of the bends sprung or broken?

A. No, sir; her bends looked fair when I saw her and her sheer looked fair, as far as I could see about her.

Q. Could you form any opinion as you saw her there as  
765 to what would be the cost of repairing her?

Mr. HAGNER: I object to that on the ground that she has been repaired, and that the amount of the repairs is now in cold figures, and it is not worth while to speculate about how much it would cost to repair her.

A. From the observations I taken of the vessel, I thought if I was to make a contract to put her in condition that I thought she was in before I thought that probably I might maybe do it for between thirty-five hundred and four thousand dollars. That is what I thought.

Q. Did you form any opinion as to the cost of repairing the particular part or place where she seemed to be raised up in the well-hole?

A. That is what I was thinking about. That is the estimate I gave of it. I didn't measure it, but I just had it in my mind, what I thought it could be done for.

Q. Could you form any opinion as to the character of the obstruction or thing which caused the rise in the keel or the spring in the keel?

A. My idea is of course like everybody else's. I suppose she was laying probably on hard bottom, some hard substance. I suppose she might have been laying there the same as any other vessel and got onto the bottom. She might have been leaking and the water got into her. The stone was into her, and it might have produced more weight into her and she caved down.

Mr. HAGNER: I object to all this. We don't want a sort of species of lecture.

766 The WITNESS: The longer she laid there, of course, probably the more she would get, from what little sea there was there.

Q. Could you form any opinion, from your knowledge of vessels and building vessels, as to the height of the obstruction, if there was any obstruction, that caused that spring or rise and whether if she had rested upon an obstruction, a rock, or whatever it might have been the spring would have been such as you saw on the vessel, on the keel?

A. In my opinion, it would have been a good deal worse than what it was. If it had been six feet high, no doubt it would have been a great deal worse, because the stone would have had to crush it to make it come up higher. As it was, I don't think there was very much obstruction there, though it might have been different to what we think.

Q. If the vessel lying at Smith's wharf had touched bottom on Saturday night loaded with three hundred tons at one end and one hundred tons at the other, or four hundred tons in all, what would have been the natural effect of allowing her to remain in that position during the night?

Mr. HAGNER: That is objected to on the ground that the position taken by the respondents in this case is that the vessel did not touch on Saturday night or Saturday afternoon, as was indicated that she

did in the libel, and therefore it is entirely an inconsistent position for the respondents to take.

A. In a case like that, if she had laid loaded forward and aft, in my opinion she would have sprung a great deal more than she was; the spring would have been a great deal larger than what it is.  
767 The spring would be more, and maybe she would have leaked more. It would have made the vessel leak a great deal more.

Q. She would have leaked more?

A. Yes, sir; in my opinion, she would have leaked more. They would have been at each end of her, and they would have sprung her more.

Q. Taking into consideration the condition of the bottom as you saw it, state whether, if she had touched on Saturday night and been allowed to remain, she would have leaked sufficiently to make her sink.

A. Yes, sir.

Mr. HAGNER: Objected to for the same reason.

(Cross-examination waived.)

CONRAD F. BENNETT,  
By E. L. WHITE, *Sp'l Com.*

JOHN J. KENDRICK, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined—

By Mr. WILSON:

Q. What is your occupation?

A. Pilot.

Q. Where?

A. On the river here, sir.

Q. On the Potomac?

768 A. Yes, sir.

Q. Do you know the schooner *Ellen Tobin*?

A. I knew her when she was loading stone; that is the first I seen of her.

Q. You saw her loading stone at Smith's wharf?

A. Yes, sir.

Q. Did you see her after she was sunk at the wharf?

A. Yes, sir.

Q. When?

A. I don't remember exactly the day, but I seen her the time she was there.

Q. Did you see her afterwards, in April, 1894, in Alexandria?

A. Yes, sir.

Q. Where was she then?

A. She was on the railway then, sir.

Q. What railway?

A. The Alexandria railway.

Q. Who was there when you were there?

A. Mr. Berry and Mr. Smith.

Q. Who is Mr. Berry ?

A. He is the foreman of the ship yard.

Q. Did you see Mr. Smith point out some spike-holes in the bottom to Mr. Berry ?

A. Yes, sir.

Q. Where were those holes ?

A. Those holes were on the starboard side, forward.

Q. How many were there ?

A. Three.

769 Q. Were the spikes entirely out ?

A. Yes, sir.

Q. How far did they penetrate ?

A. They went all the way through the bottom, sir.

Q. Sufficient to cause a leak ?

A. Oh, yes, sir.

Q. Did you see any other defects in the bottom ?

A. I saw three holes aft that had been plugged up with new pine, recently put in, on the port side, up on the tucks.

Q. How many ?

A. Three, sir.

Q. What kind of holes were they ?

A. They was the same kind—spike-holes.

Mr. HAGNER: I want to note the objection all the way through to this witness testifying to the condition of the schooner in April, nearly a year after the injury.

By Mr. WILSON :

Q. These holes that were still in the vessel, were they new or old ? Could you form any opinion how long they had been there ?

A. No, sir ; I couldn't form an opinion how long they had been there, but they looked like they had been there long enough for her to leak considerable.

Q. Were there any marks of age about them ; were they old holes ? Was there anything in them at all ?

A. There wasn't nothing in them at all but a little rust and very little of that.

Q. Could you form any opinion as to how the spikes got out ?

770 A. They rusted out, sir.

Q. They might have rusted out for months or years before that ?

A. I couldn't tell you that, sir. That is something I couldn't tell.

Q. That you could not tell ?

A. No, sir.

Q. What holes did you see—

Mr. HAGNER: Ask him if he saw any holes. That is a leading question.

By Mr. WILSON :

Q. What holes did you see other than those you have been describing?

A. I didn't see any holes in particular, only those in the construction. That is all.

Q. You saw the rise in the keel or the swell?

A. No, sir; that was after the keel was out that I saw her, sir.

Q. The keel had been cut out?

A. Yes, sir.

Q. That, of course, made a hole and that hole you saw?

A. Yes, sir; I saw that.

Q. Do you remember the Francis Baird touching bottom?

A. Yes, sir.

Q. Or getting aground at Smith's wharf?

A. Yes, sir.

Q. When was that?

A. That was on the 23rd of December a year ago.

Q. The previous year—not a year ago?

771 A. Last December a year ago; yes, sir.

Q. 1892?

A. 1892.

Q. Did you get her off?

A. Yes, sir.

Q. With what?

A. Some men.

Q. And a tug?

A. No, sir; no tug.

Q. You pushed her off?

A. Yes, sir.

Q. How long was she aground there?

A. She was aground there from Saturday afternoon until Sunday morning about half past eleven, I judge—somewhere about that. It may have been fifteen or twenty minutes one way or the other.

Q. At high tide?

A. Not exactly. I judge it must have been within half an hour or an hour of high tide.

Q. What, if any, injury did she sustain from being aground there?

A. I never heard of any, sir.

Q. Was she loaded?

A. That is all she taken, sir. She never loaded no more.

Q. She was then loaded when you got her off?

A. Yes, sir.

Q. Did she proceed on her voyage?

A. She went away, I think, on the following Tuesday.

772 Q. Without taking in any more cargo?

A. Yes, sir.

Q. Just as she was when she got aground?



A. To the best of my knowledge.

(Cross-examination waived.)

CHAS. KENDRICK,  
By E. L. WHITE, *Sp'l Com.*

773 CHARLES G. SMITH, JR., resumes the stand for further cross-examination.

The witness, in reply to the request of Mr. Hagner, produces a memorandum showing the measurements and widths of the various scows that at the time this accident happened were owned and used by the respondents and claimants at their wharf in Georgetown and at the time the diver made his examination, on November 18th, the same being returned herewith and to be found at page 336 hereof.

By Mr. HAGNER:

Q. You swear that paper is correct, do you?

A. As to all these scows I have measured myself, with the exception of these named here, 5, 12, and 13, which I could not measure—that is, they were out of reach and I couldn't measure them. All of the others I measured myself.

Q. And you swear that is correct?

A. That that statement is correct; yes, sir.

Q. Let me ask you about scow No. 4, which you say was not in use for more than a year. From what time do you mean?

A. That scow has not been in use since some time before the Tobin was sunk. It has been entirely out of use, and these scows, 2, 17, and 3, were not at the wharf on Sunday, November 18th.

Q. I want to ask you a question or two. Were you present when Mr. Wanner went down to make his examination on Sunday, the 18th of November?

774 A. Yes, sir.

Q. The four scows that he said were loaded with stone were your scows, were they?

A. Yes, sir.

Q. How far were they below that large derrick?

A. They were laying quite near the derrick.

Q. In front of your wharf or in front of the Baker wharf?

A. Partly in front of the Baker wharf and slightly overlapping the wharf where the derrick is—that is, the up-river end of the scows laid quite near the derrick.

Q. You are very familiar with that place. How far from the bin or elevator, as you call it, was the up-river end of those scows as they laid there loaded? The derrick is 76 feet from the bin and they were near the derrick. How far was it, twenty feet or thirty feet?

A. Less than that. I presume the upper end of them was—I wouldn't like to say. I didn't measure it.

Q. I don't expect you to say exactly. I am asking you for your general idea about it. Was it ten feet or fifteen feet or twenty feet, or was it five feet?

A. They probably laid there from ten to twenty feet below the derrick—that is, the up-river ends.

Q. Do you remember seeing the Tobin lying there when she came in to load. I want to ask you how she was fastened to the wharf—was it by lines—cables or lines?

A. When?

775 Q. When she came in there to load. When you saw her there during the process of loading how was she fastened to the wharf?

A. I don't know particularly as to the Tobin. They usually had a line out forward and one aft.

Q. That was about the only way a vessel could be fastened there, was it not?

A. That is the way they were generally fastened.

Q. That is the only way they could be fastened?

A. They were never anchored.

Q. In other words, they are always fastened that way, all of them. You spoke in your former examination with respect to the quarries that you were working up the river, and I think you said they were from Rock Hill park, clear on up?

A. I think that is what they call it.

Q. Do you mean a few hundred yards above the Aqueduct bridge or how far above the Aqueduct bridge? Do you mean where that restaurant is?

A. The gambling-house; yes.

Q. Where Holtzman's restaurant is?

A. Yes; the company has some lots below there, but we never work them for quarries.

Q. But that is about where your quarry begins, where Holtzman's refreshment-house is. That is known as Rock Hill park?

A. Yes; the main line of the quarry property begins just above that—just a short distance above it.

Redirect examination.

By Mr. WILSON:

776 Q. Do you know which of the scows on the river were at the river when the diver made the examination?

A. I don't know just which they were, but I know those that were not there.

Mr. HAGNER: I suppose the practical question is whether they were all twenty-foot scows. If they were, just state so.

The WITNESS: They were all twenty-foot scows.

By Mr. WILSON:

Q. Mr. Hagner has asked you if you were there when the diver went down on the 18th of November. You stated you were. State what, if any, knowledge the diver had when he went down as to the questions and issues involved in this case?

A. He had none when he went down. I wasn't present when he went down first.

Q. When were you present?

A. I came there just five or ten minutes after he had gone down the first time.

Q. And you saw the bubbles?

A. Yes, sir.

Q. That were made as he went and returned?

A. Yes, sir.

Q. How many times did he go down?

A. Four times, I believe.

Q. When he went down and when he came up each time did he make a separate record of his trip?

477 A. Yes, sir. When he came up he had a memorandum book or time book of his own, and he would make a record on that of his trip—that is, when he was down in the water, and locate the point by the piles on the wharf.

Q. You saw that done four times—four entries in his book?

A. Yes, sir.

Q. When was it he was first told anything about this controversy and what it related to?

A. He knew it was in connection with a vessel's sinking there that he was to make the examination, but after he had been down three times I told him to examine particularly that part of the bottom where the vessel laid. The last time he went down about as the scow laid, between the bin and the Tobin. I told him to examine that part of the bottom particularly and to see if there was any obstruction there.

Q. Is that all the information you gave him?

A. I told him it had been reported there was an obstruction there. He had been over that already the third time he went down, and the fourth time he went down I told him to go over it again and examine more particularly.

Recross-examination.

By Mr. HAGNER:

Q. Mr. Smith, when before the diver first went down on Sunday, November 18th, 1894, and after the sinking of the Tobin had you ever sent any other diver down?

A. Before Wanner went down?

Q. Before Wanner went down.

A. No, sir.

Q. You never had?

A. Not there.

778 Q. When did you before that ever send another diver down?

A. At that wharf?

Q. Yes.

A. Never before that.

Q. Were you ever instrumental in having any other diver go down there after the sinking of the Tobin or before?

A. No.

Q. Never at all?

A. No, sir.

Q. Are you aware that any diver ever did go down there before Mr. Wanner did, and either after or before the sinking of the Tobin?

A. Yes; I have heard so; not of my own knowledge; I don't know.

Q. When did you hear that?

A. I can't say. I understood that divers had been down in different places there in the river. I don't know as to that particular spot.

Q. You remember that Mr. Pierson testified here?

A. I knew that Mr. Pierson went down, certainly.

Q. Any other diver? Were you ever instrumental in any way in sending any other diver down there?

A. No, sir.

Q. At night, say, or at any time?

A. No, sir.

Q. Do you know of any one who ever was instrumental in sending a diver down there after the sinking of the Ellen Tobin at night? Do you know of any one who did it?

779 A. No, sir.

Q. Do you know of any one who directed it?

A. No, sir.

Q. Did your father ever direct a diver to go down there at night?

A. Not to my knowledge.

Q. Did your book-keeper, the man who testified here, Bowen, ever direct any diver to go down there?

A. Not that I know of.

Q. And you never were instrumental in having it done in any way at all?

A. In any way at all. You mean previous to Wanner?

Q. Previous to Wanner; yes, sir.

A. No.

Q. You never were?

A. No.

Q. Did you ever have Mr. Speaker say to you that the reason he did not breast off the Tobin sooner with two scows was that he did it for economy's sake; that he wanted to save the wheeling on barrows of the crushed stone?

A. No, sir.

Q. He never told you that?

A. He never did.

Q. He never, in explanation of the sinking of the Tobin, told you that?

A. No, sir.

Q. That he was trying to save you money?

A. No, sir.

Q. Did you ever hear him say that?

780 A. No, sir.

Q. To any one?

A. No, sir.

Q. Did you ever hear him say to any one that the reason he did not breast the schooner off sooner with two scows was that he wanted to save twenty cents a ton for wheeling on wheelbarrows?

A. No, sir.

Mr. WILSON: I object to all this as incompetent upon the recall of this witness.

CHAS. G. SMITH, JR.,  
By E. L. WHITE, *Sp'l Com.*

The taking of these depositions was thereupon adjourned.

E. L. WHITE, *Sp'l Com.*

781

WASHINGTON, D. C.,

December 19th, 1894—8 o'clock p. m.

Met pursuant to agreement.

Present on behalf of the libellant, Mr. Hagner.

Present on behalf of the libellees, Mr. Wilson.

Whereupon EUGENE LAMANNA, a witness of lawful age, called by and on behalf of the libellees, having been first duly sworn, is examined—

By Mr. WILSON:

Q. What is your occupation?

A. I am a civil engineer and superintendent of construction.

Q. Where and in what capacity are you now engaged?

A. I am superintendent of repairs on the Aqueduct bridge, at Washington.

Q. For the Government?

A. No, sir.

Q. For the contractor?

A. For the contractor.

Q. Who is the contractor?

A. Shailer and Schniglau Co.

Q. Did you make a drawing of the river in front of Smith's wharf?

A. Of a part of it.

Q. If so, when and under what circumstances?

A. I made it about three weeks ago and continued along for about a week in making it, partially by the request of Mr. Smith and partially an offer of my own to make it for him if he needed it.

782 Q. From what was it made?

A. From actual measurements and the reports of the diver.

Q. How were those reports presented to you?

A. Partially verbally and partially on a plat—a sketch.

Q. Will you identify the plat or sketch now shown you, marked Exhibit J. W. No. 1, as being the sketch to which you refer?

A. Yes, sir.

Q. Will you examine the paper now shown you and state if that is the drawing you prepared?

A. That is the drawing I prepared; yes, sir.

Q. And from that sketch you made this drawing?

A. Yes, sir; that is the one I made from the sketch and by measurements taken by myself.

The other of the above-mentioned drawings is here offered in evidence by counsel for the respondents, and the same is filed herewith and marked Exhibit E. L. No. 1.

Mr. HAGNER: I object to the introduction of this map for the reason that it is too late to offer it, since it was offered before by the witness Warner and it is beginning at the wrong end.

Mr. WILSON: It was not offered in evidence before and it is not beginning at the wrong end.

783 By Mr. WILSON:

Q. What measurements were made by you and indicated on this plat?

A. The shore lines, showing this dock line, the distance of the piling from the dock line and from each other, the angles of intersection where there are angles in the dock line made by offsets, the dimensions of the elevator, the location of the spout, and the location of the land line at intersection point with the dock line.

Q. These, as I understand you, were measurements actually made by you?

A. Yes; those are measurements actually made by me.

Q. And the other distances?

A. The other distances are made from that plat (Exhibit J. W. No. 1) and from conversation with Mr. Wanner while I was making it.

Q. Will you examine the exhibit or drawing now shown you, marked Exhibit No. 7, and state whether or not the shore line is correctly marked and indicated on that map.

A. I could not say just at present unless I were to put a rule on it and measure it.

Q. Have you a rule?

A. No, sir; but I can put the two plats together.

Q. Examine the exhibit and drawing now shown you, marked Exhibit No. 7, and state whether or not the shore line is correctly marked and indicated on that map.

A. Not as I make the measurements.

784 Q. State wherein the measurements differ from those made by you.

Mr. HAGNER: I object to that question until I have first been allowed to ask the witness the question with respect to this plat that he has made.

Mr. WILSON: You cannot ask him any question now.

Mr. HAGNER: I object to the question on the ground that the map is evidently made on a different scale entirely from the one which was made by Henry W. Brewer, surveyor, and should not be compared with it for any purpose.

A. They differ from the dock line, from the southeast corner of the elevator east, as near as I can judge from this.

Q. How do they differ; is the shore line further out?

Mr. HAGNER: I object to this question upon another ground, and that is that the map made by Henry Brewer, surveyor, was made while the Ellen Tobin was lying in front of the wharf and sunk, and was for the purpose of showing the exact position of the Tobin with respect to the parts of the wharf, and since she has now been removed this evidence cannot affect the case.

A. What do you mean by "further out"?

Q. Into the river—what is the difference in the shore line in the two plats?

A. My shore line is further south than the other shore line.

Q. This way (indicating)?

785 A. No; south; we are looking south now.

Q. South being the top of this map?

A. Yes, sir.

Cross-examination.

By Mr. HAGNER:

Q. I want to ask you if you were present when Mr. Wanner went down?

A. No, sir.

Q. Were you present at any time when he went down?

A. No, sir.

Q. When were you on that wharf to take these measurements?

A. Do you want the exact day, date, and minute?

Q. As near as you can get at it.

A. I made the measurements twice—once was about three weeks ago, and the second time, to verify them, was about two weeks ago.

Q. When you went down three weeks ago was that after he had been down?

A. All the measurements I made was after he had been down.

Q. Three weeks ago was a very short time afterwards. He went down one Sunday. Do you remember when it was you made the measurements?

A. About Wednesday, I think.

Q. Wednesday afterwards?

A. About Wednesday afterwards.

786 Q. How far did you take your measurements below the large derrick?

A. That is my initial point.

Q. You did not go below the large derrick at all?

A. Do you mean below—east or west?

Q. East. Did you go below the large derrick?

A. No; everything is from the derrick—the derrick and the elevator.

Q. Did you observe anything about that wharf below the derrick at all?



A. No; I don't know anything at all about down here (indicating) except that it is a straight line from here to here (indicating).

Q. For how far is it a straight line?

A. It is a straight line to the fence; there is a fence off here (indicating); it is a straight line from that point to the fence.

Q. Where is that fence situated?

A. It is somewhere in here; I do not know definitely.

Q. Do you know where the Potomac Boat Club-house is?

A. No, sir.

Q. Do you know any of these points down there (indicating)?

A. No; all the points that I know of I have shown on the plat; I know this line and this line and this line (indicating); I know these three land lines definitely and I know this derrick.

787 Q. For 32 feet east of the derrick on the wharf, then, you do not know anything about the plat that you have given?

A. East of that derrick?

Q. Yes.

A. No, sir; there is nothing shown on my plat.

Q. Never mind about your plat. I want to know if you know anything about it?

A. I don't know anything there is not on the plat.

Q. Do you know anything that is within 32 feet from the extreme eastern end of your plat and the derrick?

A. That is what I said. I know nothing beyond what is shown on my plat.

Q. Do you know anything that is in your plat from the offset, as you call it, opposite the derrick, which is here represented by the most eastern piling—do you know anything for that 32 feet east of that most eastern piling?

A. No, sir; I know nothing east of that eastern piling.

Q. Then you don't know whether it is a straight line from that eastern piling or not; you only go to the eastern piling?

A. That is all.

Q. You know nothing beyond that?

A. I know nothing beyond that pile; nothing. There is nothing designated on the plat beyond that.

Q. Were you present when there were four scows lying abreast of the wharf with stone on them?

A. That is a pretty hard question to answer. I have seen  
788 three scows and I have seen a dozen scows in front of that dock.

Q. Mr. Smith says that when Wanner went down there were four scows abreast of each other, all loaded with stone, below that derrick, on the east.

A. I don't know anything about that. I was not there.

Q. You did not see anything of them?

A. I don't know anything about it.

Q. You did not see four scows there loaded with stone?

A. There might have been scows there and I not have noticed them.

Q. I am simply asking you if you saw them.

A. I could not say whether I did or not, because I paid no attention. All of my work, as I told you—

Q. You can't say whether there were any scows there or not?

A. Anything pertaining to the south dock line, south of the piling that I measure to, out in the water, I do not know anything about. All of my work is on shore.

Q. How about the eastern piling?

A. Nothing. I don't know anything about east of that piling.

Q. You don't know anything at all?

A. I have made no measurements. I don't know anything about it.

Q. You don't know whether there is a nick in line of that wharf or not?

A. No, sir; I would not say so.

Q. You don't know?

A. I don't know. I don't know anything about east of the piling.

EUGENE LAMANNA,  
By E. L. WHITE, *Sp'l Com.*

JOHN TAYLOR recalled at the request of counsel for the libellant for further cross-examination.

By Mr. HAGNER:

Q. You have testified here before, you remember?

A. Yes, sir.

Q. Will you tell us now, as well as you remember, what you testified to?

A. I testified that I tied the line to the vessel when she come in.

Q. To what vessel?

A. I don't know here name, but the vessel that come in; the vessel what was sunk there.

Q. Do you mean the Biard or the Tobin?

A. I don't know. The vessel I am talking about is the one that was sunk.

Q. Then what else did you testify to?

790 A. I testified that there was two scows inside; what I mean by inside is one in front and one behind.

Q. Where did you testify those scows were?

A. One at the bow and one at the stern.

Q. When those scows were lying there in the way you have described, where were you?

A. I was working on one of them, sir.

Q. Which one were you working on?

A. I was working on No. 3.

Q. What were you doing?

A. Loading tubs.

Q. Then that was after you say you took the line of the vessel and tied her?

A. Yes, sir.

Q. How were all vessels tied there to that wharf and near that dock?

A. One is fastened down to the lower engine-house.

Q. One what?

A. One of the lines was fastened down to the lower engine-house.

Q. To a snubbing pile?

A. Yes, sir; and the other one is tied on the other wharf, to another pile out on the other side.

Q. On the west side of the elevator?

A. Yes, sir.

Q. And that is the way all vessels have been fastened there, is it?

A. Yes, sir.

791 Q. That is what these piles were there for, was it not?

A. Yes, sir.

Q. To fasten the lines of vessels to?

A. Yes, sir.

Q. That is the reason they were put there?

A. Yes, sir.

Q. Did you ever do any trimming in a vessel?

A. No, sir; I never done no trimming in a vessel.

Q. You never have done any trimming in a vessel?

A. No, sir.

Q. Have you ever done any wheeling in a vessel with wheelbarrows?

A. Yes, sir; I have wheeled in a vessel.

Q. Where did you do that?

A. Right on that very wharf, sir.

Q. When did they do wheeling into vessels on the wharf there?

A. I couldn't just recall the time.

Q. I don't mean at what time, but I mean when did they do it in respect to loading. Did they put the first part of the load in with wheelbarrows or the last part?

A. No, sir; the last part.

Q. They always put the last part in with wheelbarrows?

A. Yes, sir.

Q. Now tell us what they would do when they wanted to load a vessel.

792 A. Well, we would run right up to the shute. I don't know how far the shute is out into the water, but they would run right up to the shute, and if they were going to load the bow first, why they would run right straight up to the shute, you know, and put the bow right up to the shute, and the stone would come right down into the boat.

Q. From the shute?

A. Yes, sir; from the shute.

Q. And then what?

A. And then, if they were going to load the stern, of course we run her right straight up; we run her right straight up the same way, with her head right straight up towards the bridge, and load the stone.

Q. Then you put it into the after-hatch?

A. Yes, sir; in the after-hatch.

Q. Then what do you do?

A. We don't do anything else, only if she is loaded she goes away, and if she ain't loaded they keep on putting in.

Q. Keep on what?

A. Keep on crushing until she is loaded.

Q. When do you begin to wheel with wheelbarrows?

A. We begin to wheel with wheelbarrows when he says he's got enough and can't stay there any longer.

Q. Did you do any work up on the quarries?

A. Yes, sir.

Q. What did you do up on the quarries?

793 A. Wheeled stone.

Q. You wheeled stone up there, too.

A. Yes, sir.

Q. How much were you up on the quarries?

A. I have been up on the quarries off and on for twenty or twenty-five years, sir.

Q. Do you know where Mr. Smith's quarries are? Where do they begin?

A. Well, they begin a little up above Mr. Ford's, we used to call it. I don't know what they call it now.

Q. How far do they begin above the Aqueduct bridge?

A. They begin about half a mile.

Q. How far do they run up?

A. They run up about two miles, I guess.

Q. Up to pretty near the Chain bridge?

A. Yes, sir.

Q. Who was the foreman there at the wharf?

A. Mr. Speaker was the foreman at the wharf.

Q. Who was it that told you to go to work to load with wheelbarrows, and who was it announced to you that it was time to put the wheelbarrows on?

A. We didn't put no wheelbarrows on her at all.

Q. I am not talking about her; I am talking about generally when you loaded vessels there.

A. Mr. Speaker.

Q. Mr. Speaker would tell you when to begin to load with wheelbarrows?

A. Yes, sir.

794 Q. Did you say to us here, that night that there were two scows inside and abreast of each other, between the Tobin and the wharf?

A. No, sir.

Q. You did not?

A. No, sir.

Q. How do you know you didn't?

A. I know I didn't.

Q. Were you here when Mr. Speaker was examined?

A. Yes, sir.

Q. Did you hear him say that you did?

A. No, sir.

Q. I wonder how he come to say that you did say that.

A. I don't know, sir; he made a mistake, maybe.

Mr. WILSON: I object to that question as incompetent.

By Mr. HAGNER:

Q. Can you account for it? He made a mistake, maybe.

A. Yes, sir.

Q. You think Mr. Speaker made a mistake about that?

A. Yes, sir.

Q. You couldn't have made a mistake about it?

A. No, sir.

Mr. WILSON: I object to this question upon the ground that the statement made by Mr. Speaker was not made, as the record will show.

Mr. HAGNER: It is on the record that Mr. Speaker said that he did say so.

795 Mr. WILSON: The record will speak for itself. He said there were two scows between the wharf and the vessel.

Mr. HAGNER: He said they were abreast of each other between the wharf and the vessel, and Mr. Speaker said there were two scows abreast of each other between the wharf and the vessel, and I say there were two scows between the wharf and the vessel abreast of each other.

The WITNESS: He was wrong there, sir.

Q. You say they were not abreast of each other?

A. No, sir.

Redirect examination.

By Mr. WILSON:

Q. All of the vessels that were loaded with stone at Smith's wharf were not loaded or partly loaded with wheelbarrows, were they?

Mr. HAGNER: I object to that way of putting the question. I object to the question and the form of it, and I have to state that I think it comes with poor grace from our distinguished friend, at this late day, for him to ask such a leading question. If he wants to ask the witness a question let him ask what was the fact and not say, That was the fact, wasn't it?

By Mr. WILSON:

Q. Were all the vessels loaded with wheelbarrows or partially loaded with wheelbarrows?

A. They were partially loaded with wheelbarrows.

796 Q. All of them?

A. Yes, sir.

JOHN TAYLOR,  
By E. L. WHITE, *Sp'l Com.*

HARRY S. EDWARDS, a witness of lawful age, called by and on behalf of the libellees, having been first duly sworn, is examined—

By Mr. WILSON :

Q. What is your occupation ?

A. Submarine diver.

Q. Where are you engaged ?

A. At the present time ?

Q. At the present time.

A. At Mr. Smith's wharf.

Q. In whose employment have you been recently ?

A. In the employ of the Government and also of the Pennsylvania railroad.

Q. Are you working for yourself or under a contractor ?

A. Under a contractor.

Q. Who is the contractor ?

A. Capt. John J. Williams.

Q. Where is his place of business ?

A. Thurlow, Penn.

Q. What is Mr. Williams' business ?

A. Submarine diving and contractor.

797 Q. Thurlow is where ?

A. In the south part of the city of Chester.

Q. How long have you been engaged in submarine diving ?

A. 5 years.

Q. Where ?

A. Principally all over the United States.

Q. On tide water ?

A. Yes, sir.

Q. What experience have you had in submarine diving and in raising vessels ?

A. I have had quite a good deal of experience in raising vessels of different classes.

Q. Where ?

A. I have had experience on the Chester flats and also on Ridley creek, in Pennsylvania, on the Delaware river.

Q. Where were — last at work before today ?

A. At Easton, Penn.

Q. Doing what ?

A. Working on bridge-work and submarine diving.

Q. Have you been engaged lately on the Aqueduct bridge ?

A. Yes, sir ; three weeks ago I examined the Aqueduct bridge for the Government. I made a general inspection all around.

Q. After the work of the contractors had been done ?

A. Yes, sir.

Q. Under whose direction was that examination made ?

798 A. The direction of Col. Davis.

Q. Who was in charge of the work ?

A. Col. Davis, as head engineer.

Q. Have you recently made an examination of the river bottom opposite to Smith's wharf, in Georgetown ?

A. Yes, sir.

Q. Did you go down in a diver's suit ?

A. Yes.

Q. When?

A. Today.

Q. Where did you go down from?

A. From the west end of Mr. Smith's wharf was the first start.

Q. Did you go off from the wharf or from a scow?

A. Off from a scow. The scow lay close into the wharf.

Q. You went off from the lower end of the scow?

A. I went off from the upper end of the scow—the west end—and made an examination the whole entire length of the wharf.

Q. State if anywhere in front of the wharf, in the bottom of the river and within thirty-five feet of the outer line of the scow, you discovered any large rock, and particularly if you found any rock five or six feet above the bottom, twenty or thirty feet long and seven or eight feet across the top?

Mr. HAGNER: I want to note an objection to the testimony on the ground that it is not of the slightest consequence, and  
799 that it — too late now, after the injury of the vessel, to make the matter of whether there is a rock there or not of any interest; that it is not and never has been decided to be a proper subject of examination, after a vessel has been injured on an obstruction, to take testimony a year afterwards as to what obstruction still exists in a dock, as it is not at all material.

A. No, sir.

Q. Will you state generally the character of the bottom on the whole front of the wharf for a distance of thirty-five feet beyond the outer edge of the scow?

Mr. HAGNER: I object to the question on the ground that it is immaterial what the present condition of the bottom of the river in front of Smith's dock is and for the additional reason named in the objection to the last above question.

A. The bottom of the river there I would pronounce a fair bottom, and any vessel that was not partly rotten could lay there without injury.

HARRY S. EDWARDS,  
By E. L. WHITE, *Sp'l Com.*

No cross-examination.

The further taking of these depositions was thereupon adjourned subject to notice.

E. L. WHITE, *Sp'l Com.*

800 WASHINGTON, D. C., January 16, 1895—3 o'clock p. m.

Met pursuant to agreement.

Present on behalf of the libellants, Mr. Hagner.

Present on behalf of the respondents, Mr. Wilson and Mr. Barnard.

Whereupon HENRY P. GILBERT, a witness produced by and on behalf of the respondents, having been first duly sworn, is examined—



By Mr. WILSON :

Q. State your name, age, and residence.

A. My name is Henry P. Gilbert. I am of lawful age. I live in Georgetown, D. C.

Q. Do you know the wharf property now occupied by Smith & Sons in Georgetown?

A. Yes, sir.

Q. How long have you known it?

A. About 30 years.

Q. In a business way what had you to do with that wharf property before Smith & Sons occupied it?

A. I say I knew the wharf property for 30 years. I was in that neighborhood all that time. I don't remember when I did take possession of the place. I own three warehouses and the wharf property connected. I don't remember when I did buy that property. I left there five years ago next June.

801 Q. Did you lease this particular wharf that we are now inquiring about to the Potomac Stone Company?

A. Yes, sir.

Q. You are still the lessor or owner?

A. Yes.

Q. Which?

A. Both.

Q. You are lessor and owner. You occupied it, as I understand, for a number of years prior to five years ago?

A. Yes, sir.

Q. What business was carried on there?

A. Well, I had a crushing plant for a portion of the time, and then I carried on the junk business there for some years, bought Government property, clothing, wagons, and harness, and so on.

Q. Who owns the wharf adjoining your wharf?

A. Which way, east or west?

Q. East I mean.

A. Mr. Smith owns it, or the Potomac Stone Company, I don't know which. I guess Mr. Smith can put me straight there.

Q. Your wharf is west of the wharf occupied by the Potomac Stone Company, and has been occupied for how long?

A. I think when we started down there I turned the lease over to Mr. Smith for that property, and he afterwards bought it; that is my recollection; that property formerly belonged to Ferch,

802 I believe, or Mrs. Barrett; Ferch married Mrs. Barrett; I believe it was her property, but he had the handling of it.

Cross-examination.

By Mr. HAGNER :

Q. At that time the stone-crusher that Mr. Smith had was not where it is now, was it?

A. No, sir.

Q. Where was it?

A. It was further west than where it is now.

Mr. WILSON: You mean east?

The WITNESS: I beg pardon. I stated it wrong.

Mr. HAGNER: Further east?

A. Yes, sir.

Q. How much further east than it is now?

A. Well, it was entirely on my property, and now, according to my recollection, it is partially on mine and on the property bought from Ferch.

Q. In other words, the Barretts, as you recollect, sold the property that the bulk of the stone crusher and elevator are on now to the Potomac Stone Company, and the Potomac Stone Company have leased the property to Mr. Smith; is not that right?

A. I don't know it, but I suppose that is right.

Q. This is the adjoining property east of the Barrett property?

A. Yes, sir.

Q. That is east of the property that was sold to the Potomac Stone Company by Mr. Barrett or Mrs. Barrett (who was  
803 Mrs. Ferch, I believe); is that right?

A. Yes; but you mean she is Mrs. Ferch now.

Mr. HAGNER: Mrs. Ferch now; yes. The Barrett property, in other words, was sold to the Potomac Stone Company and the property that you have was leased directly by you to the Potomac Stone Company, was it not?

A. Yes, sir.

Q. And that lease is not recorded?

A. I do not know.

Q. Have you that lease?

A. I have it at home.

Mr. HAGNER (to counsel for respondents): Have you any objection to admitting that that lease is not recorded? Mr. Smith knows that it is not of record.

Mr. WILSON: We are not testifying now.

Mr. HAGNER: I can probably get at the line in this way:

Q. Is there at present a fence to the west of the stone crusher?

A. Yes, sir.

Q. About how far—do you remember?

A. It is right on the line.

Q. Only a few feet to the west of the stone-crusher?

A. Yes, sir.

Q. Where is the next fence east of that fence?

A. Well, I don't know of one until you get down to the Inland and Seaboard. I think there is one, though.

Q. Is it not a fact that there is no fence until you get to the Columbia boat-house?

804 A. Yes, sir; that is a fact.

Q. There was no fence between the Columbia boat-house and the fence west of the stone-crusher?

A. Not at that time.

Q. And was not in 1889, at the time of the injury to the vessel Tobin?

A. Not that I know of. Posts are standing there.

Q. But no fence. Now, Mr. Smith in 1889 was occupying the property that was bought from Barrett by the Potomac Stone Company; he was also occupying the property leased by you to him, as you have mentioned, and was also occupying the Baker property, just east of that, was he not?

A. I could not tell you how long he occupied that.

Q. You know he did at one time occupy it?

A. He rented the wharf.

Q. Do you know whether he was renting another wharf still east of the Baker wharf?

A. No; I do not.

HENRY P. GILBERT,  
By E. L. WHITE, *Sp'l Com.*

805 GEORGE A. NOWLAND, a witness produced by and on behalf of the respondents, having been first duly sworn, is examined—

By Mr. WILSON :

Q. What is your occupation?

A. Clerk for the Marine Railway, Ship Building and Coal Company of Alexandria.

Q. You have already testified in this case?

A. Yes, sir.

Q. You testified concerning the schooner Ellen Tobin?

A. Yes, sir.

Q. And her being repaired at the marine railway in Alexandria?

A. Yes, sir.

Q. Do you know what became of the vessel—where she is now?

A. I don't know where she is now. I understood she was loading for an eastern port when she left here.

Q. She was in service the last you heard of her?

A. Yes, sir.

Q. Who owned her at the time she left the marine railway?

A. I think she belonged to a man by the name of John A. Curtis.

Q. From whom did he buy her?

A. He bought her from me.

Q. What did she sell for?

A. One thousand dollars.

806 Q. After she was sold will you state what repairs were put upon her?

A. Do you mean general repairs?

Q. General.

A. I could not specify the character of the work, but I think the expenditures for repairs amounted to about \$8,000.

Q. For what purpose and under whose direction?

A. That was under the underwriters' inspector, a man by the name of Fox.

Q. And under what directions as to the class of vessel she was to be?

A. I think she was rebuilt to be rated.

Q. Rated at what? What do you mean by that?

A. A # 1, or near that, I think. When she left there she was rated at A # 1½; I think so; I won't be positive on that point.

Q. State in a general way what repairs were made on her to remedy the injury caused by the accident and about the cost of the general repairs that were made—all the general repairs and the special repairs made necessary by the injury.

A. I think that Mr. Berry could answer that question better than I can, because I am not familiar with the character of the work; he could give a more detailed statement of the character of the work than I could.

Q. Can you state what the bill of the marine railway was against the vessel?

807 A. I say about \$8,000.

Q. Can you state any more definitely?

A. That included the charges for the cash advanced to some of the employes in charge of the vessel; that would reach possibly \$100, and also some freight charges for the freight or transportation of material from Richmond to Alexandria.

Q. How much was that?

A. I don't know accurately what that amount is; I should say, however, something like \$50; possibly more.

Q. What general repairs were paid for or charged for caulking or anything of that sort?

A. That is in the general repair account.

Q. Have you a copy of that account?

A. No, sir; I have not.

Q. Can you state what, if any, estimate was made of the cost of the repairs made necessary by the injury that was done?

A. Before she was repaired?

Q. Yes.

A. There was none made to my knowledge. I have learned since from Mr. Berry by conversation Mr. Smith and I had with him that he said he had made an estimate of \$5,500 on account of the break.

Q. You are not a ship-builder yourself?

A. No, sir.

Cross-examination.

By Mr. HAGNER:

Q. You mentioned first \$100 advanced to the hands. On what work was that advanced?

808 A. That was money advanced to the employes.

Q. Under Curtis?

A. Yes, sir; men he had in charge of the vessel; but I mean money to pay their board, &c.

Q. That was \$100?

A. About.

Q. You say that there was about \$50 extra; do you remember whether or not that \$50 extra for freight included a bill for \$27 for bringing up the keel?

A. I won't be positive about that. I think the amount of \$50 of freight charged was for several bills.

Q. Out of that freight charge \$27 was for bringing a keel up from where?

A. From Richmond.

Q. The new keel for the Tobin?

A. Yes, sir.

Q. Is it not a fact that when the Tobin left Alexandria her name had been changed to Curtis?

A. Yes, sir.

Q. What was her full name?

A. The Mary Curtis.

Q. Is it not a fact that she left Alexandria with 675 tons of coal on her?

A. I don't know about that.

Q. Did you hear of that?

A. No, sir.

Q. Is it not a fact that she has cost Mr. Curtis between \$11,000 and \$12,000 for her repairs?

809 A. I could not testify to the repairs made by Mr. Curtis; I do not know what he spent. I know that he sent material to go in her—ropes, paint, and things of that kind.

Q. What else?

A. He sent coils of rope and several boxes of paint; I don't know of anything else outside of the keel.

Q. Was that included in your bill?

A. Not the ropes and paint.

Q. The ropes and paint were not included in your bill?

A. He sent paint enough there to give her one coat.

Q. That is not included in your bill?

A. No.

Q. What was the expense of the marine railway there every day?

A. What do you mean by day?

Q. On the Tobin for repairs.

A. You mean the total charge per day?

Q. Yes.

A. Some days there would be eight to ten men on her, and sometimes not quite so many.

Q. What would be the charge of the marine railway itself for the rent of the railway?

A. Our contract with him was \$10 a day.

Q. For how many months was she there?

A. She was hauled out, I think, on the 31st day of March, if I am not mistaken.

Q. And she remained there until when?

A. She was there until the latter part of July or first part of August, I think.

810 Q. Do you remember that it was the 15th of August?

A. It was in August.

Q. She lay there from March until some time in August, then, at a charge of \$10 a day?

A. No. During that time there was a detention caused on account of being unable to get this piece of timber necessary to make her keel, and when that timber came we reduced the charge to a charge every other day, on account of the delay, until that piece of timber arrived.

Q. Then during that time the charge amounted to \$5 a day?

A. Yes. In other words, we just charged him with every other day for the time:

Q. How long was it before the timber came; do you remember?

A. I should say about two weeks.

Redirect examination.

By Mr. WILSON:

Q. What requirement did the inspector make as to the Tobin being caulked?

A. I think that question could be better answered by Mr. Berry, he being the superintendent of the yard.

Q. If you know it you can state it as well as he.

A. I don't know it. I know that she was required to be rebuilt under the underwriters' inspector, and whatever he said to do they did.

Q. And whatever was done was done under his direction?

A. Yes, sir.

811 Mr. WILSON: I am going to ask you to make a copy of the bill that was rendered by you.

The WITNESS: All right, sir.

Mr. WILSON: Send it to Mr. Smith.

Mr. HAGNER: That will be satisfactory to me, for I should put it in if you did not.

GEORGE A. NOWLAND,  
By E. L. WHITE, *Sp'l Com.*

THOMAS BERRY, a witness produced by and on behalf of the respondents, having been first duly sworn, is examined—

By Mr. WILSON:

Q. What is your occupation?

A. Ship carpenter.

Q. Where are you engaged?

A. I am engaged at the Marine Railway, Ship Building and Coal Company of Alexandria.

Q. In Alexandria?

A. Yes, sir.

812 Q. Do you know the schooner Ellen Tobin?

A. Yes, sir.

Q. What had you to do with her repairs a year or two ago?

A. I was superintendent of the yard at that time.

Mr. HAGNER: And is now.

A. Yes.

Mr. WILSON: About when was she brought to the yard?

A. I could hardly tell you; some time about the last part of March or first part of April, I believe. I could have posted myself if I had thought about it. I don't know about the time, but I think it was about the last of March or the first of April somewhere.

Q. What year?

A. Last year—1894.

Q. What was her condition when you first saw her?

A. She was in pretty bad condition.

Q. Describe it; what was it?

A. She was broke in two, right in the center.

Q. Was she a centerboard vessel?

A. Yes, sir.

Q. Did you repair her?

A. Yes, sir.

Q. Was she a centerboard vessel when she left your hands?

A. No, sir; she was a keel vessel.

Q. You put in a new keel?

A. Yes, sir; had to put in a keel, anyhow, centerboard or not; they concluded to take the centerboard out and make a keel vessel of her.

813 Q. And put in a keel?

A. Yes, sir.

Q. Describe generally the changes that were made in her—what was done to her.

A. That was the only change from her original build, you know. They took her well out and put in a keel. They took out the well and put floor timbers across her and made a keel vessel of her; put an extra piece of keel on the bottom of her, so as to make her a little deeper.

Q. How much deeper was she?

A. Eight inches, I think.

Q. How much more water did she draw?

A. Drew just that much more water.

Q. Drew 8 inches more of water?

A. Yes, sir; eight inches more of water.

Q. How much did that increase her capacity?

A. It didn't increase it any at all that I know of.

Q. What work was done on the vessel except that work that was absolutely necessary to repair her in respect of her broken keel or the broken well?

A. I suppose we done extra work, maybe, to amount to a thousand dollars outside of the damage by the break.

Q. Was any estimate made of the cost of repairing the damage?

A. Yes, sir; I made an estimate. As near as I can remember, I think it was between \$5,000 and \$6,000—about \$5,500. That did not include the railway charges, which would have been extra, because at that time Mr. Agnew, the owner of the yard, owned the vessel, and, of course, it was pretty dull times, and

814



if we had done the work there that would only include the work and the railway charges he would have had to foot himself.

Q. Under whose supervision and direction were the repairs made?

A. Under a gentleman by the name of Fox, the underwriters' agent.

Q. And he directed everything that should be done to her?

A. Everything that was necessary to be done he directed to be done. It was done under his supervision; everything he recommended we had to do, of course.

Q. How did he give his directions?

A. He came here in person.

Q. Were the directions verbal?

A. Verbal; yes.

Q. Not in writing?

A. Not in writing; no. He made several visits and would tell me just what to do, and, of course, I would do it.

Q. Where was he from?

A. He was located in Richmond, Virginia, I think.

Q. And he was the agent of the underwriters?

A. The agent of the underwriters; yes.

Q. What directions did he give about caulking her?

A. He authorized us to caulk her all over, from keel to her decks, lower decks and everything.

Q. What direction did he give about the rigging?

A. That I don't know anything about. I had nothing to do with that.

815 Q. What direction did he give about a new deck?

A. He authorized me—I had to put in a new lower deck entirely, and the upper deck I put in where it was necessary to put it.

Q. Why did you put in a new deck below?

A. Part of it was rotten, a good deal of it was worn—worn considerably, you know, by the cargo or something—that had been on it—and I put in a whole new deck below and a nearly new deck above.

Q. Was the upper deck rotten in places?

A. No; it was not rotten in places.

Q. Why was it necessary to put in all that new deck above?

A. The upper deck was all busted up.

Q. Do you mean it was burst up all the way?

A. There were five or six beams that were broken and busted up, and, of course, we had to put in a great deal more deck than we would if it hadn' been busted.

Q. Was the upper deck in perfect order except where it was broken?

A. There was some little rotten wood about it.

Q. Where?

A. Different parts of the vessel.

Q. Was she an old vessel?

A. Yes, sir; they said, I think, about 18 or 20 years old.

Q. Can you form any opinion as to when she had been caulked before you caulked her?

816 A. No; I understood she had been caulked about two or three years ago. I noticed, though, when we hauled her out that her seams had been cemented with cement, and I noticed that forward the cement had never broke out of her seams at all. She was lying on the ways for five or six weeks or two months, and, of course, that necessarily opened the seams a little.

Q. What did you do about the vessel's cabin?

A. Well, we done some little work about the cabin—carpenters' work—and scrubbed it out and painted it and grained it.

Q. Put in any new furniture?

A. I think they did. I had nothing to do with that. I think they did put some new furniture in.

Q. New masts?

A. No; no masts. We made two booms, two spars, main boom and spanker boom.

Q. They were broken?

A. They were broken; yes.

Q. Where; broken in two?

A. Yes, sir.

Q. So as to be worthless?

A. Yes, sir; broken in two somewhere—I forget where—somewhere about the slings. That was not caused by the break, though; that is where they generally break.

Q. Why did you put in those new booms?

A. Because they were broke.

Q. Did anybody require it to be done?

A. Oh, yes; the inspector.

817 Q. The inspector required it to be done?

A. Yes, sir.

Q. How did the inspector communicate his directions to you? Did he tell you what he wanted done?

A. Just verbally.

Q. And you did it?

A. Certainly; whatever he said I done; of course, he was the boss.

Q. Have you any way of knowing or stating definitely what this extra work cost that was ordered by the inspector?

A. No; I don't know really what it cost, but I suppose there was about a thousand dollars extra work on it.

Q. What did that thousand dollars of extra work consist of?

A. Caulking her all over and—

Q. How much would be the cost of caulking her all over?

A. I don't know; I can't itemize it; I just tell you what we done extra.

Q. You say it came to about a thousand dollars?

A. I was just making a rough estimate.

Q. Well, make a rough estimate.

A. I can't estimate it. We caulked her all over.

Q. Make a rough estimate of the cost of caulking her all over.

A. I can't make a rough estimate now hardly. I am just telling you what we done. We caulked her all over and caulked the  
818 decks over; we made two spars—the spanker and main boom; we put a gripe on her forward and we repaired her hatches up, and we put a rail on her from amidships all around aft on one side, and we cut out right smart of planks aft so that the inspector could examine her timbers; we cut out four or five planks there on each side so that the inspector could examine her, and other little jobs. I suppose to make a rough calculation I should say nearly about a thousand dollars; that is as near as I can come at it. We put in extra planks between decks.

Q. Did that include the decks?

A. That included everything; yes, sir; I suppose that would cover everything; all the extras the carpenters done.

Q. How much did it cost to put in the keel?

A. We had to put in a keel, anyhow; that was not extra; that had to be done, anyhow.

Q. You say that was no extra charge at all?

A. No; no extra charge. That had to be done because the keel was broken in two.

Q. What should you say would be the cost of caulking a vessel of that size and style from stem to stern?

A. I suppose it would cost in the neighborhood of \$200 or \$300 for material and everything.

Q. And how much would be the cost of making the lower deck?

A. Well, I don't know; that wouldn't amount to much, what extra deck we put in there, because we would have had to cut through there, anyhow, and taken it right up. It only went back to the bulkhead. That wouldn't have amounted to over \$25 or \$30, anyhow.

819 Q. What was the condition of the vessel when she left your hands?

A. She was in first-class order.

Q. A #1½?

A. I think so; yes. She was a good vessel when she left the yard there.

Cross-examination.

By Mr. HAGNER:

Q. You say that the vessel was taken up in March, as well as you remember. Do you remember that the vessel was taken up in March for her repairs; that she was taken up twice; that she was taken up in March after you determined to repair her for Mr. Curtis, and do you not remember that the vessel was taken up away back in January?

A. I know she was taken up twice. I could tell you if I had my book here, but I didn't post myself. We hauled her out twice; just once to look at her condition, and we just glanced over her, and she laid at the railway some time, and then Mr. Agnew bought her or traded his tugboat for her and then we hauled her out again, and

I think that was about the last of March or the first of April. I could tell just when it was if I had my book. I generally kept a book that I booked them in, but I didn't think anything about this. I didn't know that it was necessary or I could have told you the very day that she was hauled out.

Q. This vessel had been injured on the 6th day of August, 1893. She had been lying in Georgetown harbor for three months; she was taken up and was afterwards sunk on the flat of Analoston island; she was then brought across from Analoston and sunk on the flat near the mouth of the 17th Street sewer; she lay there for some time; then she was taken up and sent to Alexandria and lay at Alexandria for some weeks; she was then put up on the ways in Alexandria for some considerable time; she was then taken off and put in the water; she was then taken up and put on the railway and was kept there for three months undergoing repairs.

A. Yes.

Q. Could it be possible that any vessel could go through that regime or through that course without having been caulked from stem to stern?

A. Not well; no; for you see she laid there so long on the railway in the heat of summer.

Q. Her seams would all open?

A. It would open the seams; yes.

Q. There was no rigging put on her there?

A. I didn't see any.

Q. There was no rigging put on her there at Alexandria at all?

A. Yes; there was.

Q. Was she rigged in Alexandria?

A. Yes, sir; she was rigged out in Alexandria.

Q. I do not mean rigged out all through, but did she have new rigging put on anywhere in Alexandria?

A. Yes, sir; below.

Q. Was that included in the railway bill?

A. No, sir.

821 Q. That had nothing to do with this railway bill?

A. No, sir.

Q. That was extra. You say, Captain, that her depth was added to about 8 inches?

A. Yes, sir.

Q. When you say that, you do not mean that her capacity was in any way increased, but you simply put 8 inches more heel on her?

A. Yes, sir.

Q. Because in making her keel you had to do that in order that she should have sufficient hold on the water when she was sailing; was that the idea?

A. That was the idea.

Q. It had nothing to do with making her a larger vessel or making her carry a ton more of anything?

A. Not at all.

Q. What do you mean by a gripe?

A. It is a portion of the stem—the forward part of the vessel—outside of the vessel entirely.

Q. On the hood?

A. Yes; right on the outside of the stem.

Q. What is it shaped like?

A. It comes up outside the vessel.

Q. Does it lie alongside the bowsprit?

A. No, sir; it is a kind of cut-water, or whatever you may call it.

Q. It goes on her outside?

A. Yes, sir.

822 Q. A new cut-water; is that it?

A. Yes, sir.

Q. By a gripe you mean a cut-water, do you?

A. You can call it that. I suppose it is as near that as anything else. It is outside the vessel entirely.

Q. Is it not a fact that the object of making the Ellen Tobin a keel boat was to strengthen her?

A. No; I don't know that it was done on that account. The man that bought her said he didn't care about a centerboard boat. I don't know that it strengthened her any.

Q. Then she was going to be a seafaring vessel, was she, rather than a river vessel or coaster?

A. I suppose so. That was his idea, I suppose.

Q. Did you ever hear what trade she was meant for?

A. What trade?

Q. Was she meant for the guano trade?

A. The guano trade or something of the sort. I understood she was going into guano or South Carolina rock, or something of the kind. I think that was the object.

Q. Captain Curtis is president of the guano company, is he not?

A. Not that I know of.

Q. You do not know him?

A. I don't know anything about his business at all. I believe she carried a load of coal from here.

Q. Do you remember whether or not the decks had been cut up in order to get a stone cargo out of her?

A. No.

823 Q. Both above and below. You do not remember about that?

A. No; I think they got her cargo out of the hatches. I don't think any of the decks was cut up, but it was busted right up. The rock, or whatever she struck on, busted up about two or three feet; but the cargo was taken out of the hatches, I think.

Q. It is in testimony here that they had to cut pieces out of her deck and put pumps in in order to get the stone out. I don't know whether you remember that.

A. I don't know that they cut them out. They may have put pumps in the hatches. There may have been a plank or two cut out of the decks. I won't be certain about that.

Q. Do you mind telling us what the character of the Tobin was as a vessel?

A. As far as I saw, she was a good vessel—timbers, planking, bottoms, and everything was sound.

Q. Was the keel sound?

A. Oh, yes; everything was as sound as a dollar. There was some rotten wood above decks, a little around the rail, and such as that, but down below her timbers was very sound, and the planking on her was very sound. Whether there had been a new bottom put on her or not I don't know, but it was certainly sound and hard.

THOMAS BERRY,

By E. L. WHITE, *Sp'l Com.*

824 CHARLES G. SMITH, JR., one of the respondents, was recalled and examined further—

By Mr. WILSON:

Q. You have already been sworn and examined in this case?

A. Yes, sir.

Q. Will you state if since the Ellen Tobin sank opposite your wharf, in August, 1893, and from that time to the present, any dredging has been done by you or by your direction or to your knowledge opposite the wharf?

A. No, sir.

Q. State what, if any, blasting of rocks or other obstruction has been done or attempted in front of that wharf during that time.

A. Nothing at all.

Q. State if any investigation has been made by your direction or on your behalf by any divers of the bottom of the river or slip opposite your wharf except by those who have been examined here—Mr. Wanner, Mr. Patry, and Mr. Edwards.

A. None except those.

Q. I understood you to say that the bottom had been dredged in 1893 by Mr. Summers? Mr. Summers has so testified?

A. Yes, sir.

Q. Was it before that?

A. It was dredged in 1892, in the spring previous.

Q. By whom?

825 A. By the same man.

Q. And when the examination was made in 1893, what report was made to you as to the condition of the bottom or the depth of the water?

Mr. HAGNER: I object to that on the ground that it is irrelevant and immaterial.

A. It was reported by the dredgeman that there was between 14 and 15 feet of water there.

Q. That was made immediately after the dredging?

A. That was his report as to the depth of water.

By Mr. HAGNER:

Q. Was that report written or oral?

A. Well, it was an oral report. He stated that there was 14 or 15 feet of water.

Mr. HAGNER: I object to anything that the dredger stated to Mr. Smith as merely hearsay and on the ground that it was Mr. Smith's duty to find out for himself the depth of water.

The WITNESS: I was just going to tell you about that. Shall I go ahead with what I was going to say?

Mr. WILSON: Yes.

The WITNESS: I say that the dredgeman reported to me that there was between 14 and 15 feet of water there. This was when he had stated that his work was completed. I told Mr. speaker to go out with him and see him sound over the bottom. I was on the wharf and Mr. Speaker went out with him, and I believe Mr. Summers himself cast the line, Mr. Speaker watching it and I watching it from the shore. I saw them sound, and they both reported 14 or 15 feet of water.

826 By Mr. WILSON:

Q. You saw the examination actually made?

A. I saw the soundings made myself. I was on the wharf. That was before I paid his bill.

Q. And then it was reported to you when the soundings had been made?

A. He made the report and then I had the soundings made so as to be sure that it was about right.

Q. As they sounded, did they announce the result to you while you were standing there?

A. No; I think not. I saw them cast the line, and Mr. Speaker was with him, so that he saw the different soundings, and when he came in he stated that it was all right; that the soundings showed that depth of water.

Q. You have already stated, I believe, the date when the Ellen Tobin was towed away?

A. November 23.

Q. Were you present on the wharf when she was towed away?

A. Yes, sir.

Q. What time was it?

A. Two o'clock in the afternoon.

Q. Of what date?

A. November 23, 1893.

Q. Will you state, if you know of your own knowledge, how much water she then drew, at the time she was towed away?

A. She had 12 feet forward and 13 feet aft, by marks.

Q. Do you know how much tide there was at that time? Will you produce, if you please, a copy of the Evening Star of  
827 that date, showing the hour of high tide and of low tide?



Mr. HAGNER: I object, first, as immaterial as to what the Tobin drew at that time, as she was probably at that time over the rock, and that there was  $3\frac{1}{2}$  feet of clear space between that rock and the bottom of that vessel, and that every part of the bottom of the vessel was raised clear of the top of that rock. Therefore it would be immaterial. I object to anything contained in the report of the Star as immaterial and irrelevant, for the reason that any report in a newspaper is as liable to be inaccurate as it is possible for any human testimony to be.

The WITNESS: It is from the Hydrographic Office.

Mr. HAGNER: It is further objected to on the ground that if taken, as this witness says, from the Hydrographic Office, the only place that the Hydrographic Office takes the tide is at the navy yard, which is  $3\frac{1}{2}$  or 4 miles from the place where the Ellen Tobin lay, and that there is a difference of an hour and a half at least between the rise and fall of the tide at the navy yard and at Georgetown; that there are half a dozen tides in the Potomac river at one time; that if a west wind blows, the wind retards tides from rising towards Washington and keeps them back sometimes for hours, sometimes causing the skip of an entire tide; so that such a report as this could not in any way be even partially accurate.

The WITNESS: Shall I state what this is?

Mr. WILSON: Yes.

The WITNESS: This is the Evening Star of Thursday, November 23, 1893, and it shows as follows:

828

*Tides Tomorrow.*

High tide.		Low tide.	
7.51 a. m.	8.18 p. m.	2.12 a. m.	2.18 p. m.

By Mr. WILSON:

Q. Have you the Star of the 4th or 5th of August, 1893?

Mr. HAGNER: I object. I will ask the examiner to certify this case to the court to ascertain whether the witness shall be allowed to answer that question.

Mr. WILSON: I withdraw the question.

Q. In respect of the loading of vessels at your wharf, I wish you would state how the loading was done and what occasion there was to use wheelbarrows, when they were used, and why.

A. As to the usual custom in loading?

Q. Yes.

A. An ordinary-sized vessel is loaded under the chute entirely, but a vessel of greater draft the captains would sometimes think they had better shove further out, and in that case we put in two scows and loaded with wheelbarrows. It was only done on larger vessels.

Q. Mr. Hagner questioned you in his cross-examination in respect of the statement made in your answer concerning the agree-

ment as to the loading of the vessel. You have already explained, I believe, how the arrangement was made concerning the loading, what you did, and how the services of the vessel were obtained.

Do you wish to add anything to your statement?

829 A. No; I think not. The vessel was there before. I was going to say she was there before I knew anything about her coming, but I think Captain Lee stated that a vessel was coming to load with stone; but there was no arrangement made with the captain or with anybody else, no more than that I knew that there was a vessel coming or several vessels coming, and this vessel came.

Q. It was under the general course of business, as you have already explained it?

Mr. HAGNER: I object to Mr. Wilson saying that it was under the general course of business.

A. This vessel came, as all the other vessels came on this contract, without any charter and without any previous arrangement by me with any of the captains.

Cross-examination.

By Mr. HAGNER:

Q. Mr. Smith, you said that in 1892 that bottom had been dredged out before by the same man?

A. Yes, sir.

Q. He did not dredge in that same place that year, did he—in that same place?

A. Yes, sir.

Q. No. Did he not dredge east of that place and east of that place only?

A. He did dredge east of the place, and also dredged at this point.

Q. He testified, I am almost sure——

A. I guess you are wrong about that.

830 Q. Is it not a fact that the dredging which Captain Summers did in Georgetown for you was done east of the berth in which the Ellen Tobin was lying or east of your stone-crusher?

A. That was the particular reason for bringing him there, to dredge some part of that east of the stone-crusher; that is true, but at the same time he dredged at other points, and in this berth I am quite sure.

Q. In what part of the berth, please?

A. Where the vessel lay.

Q. It is 136 feet long. What part of it?

A. The idea of having him dredge the berth was to dredge where the vessel lay, in order to take stone from this chute; that is where he dredged the second time, and the only place he dredged.

Q. I am now asking you whether he dredged in the berth where the Ellen Tobin lay the first time, in 1892?

Mr. WILSON: That was not the question.

Mr. HAGNER: It was the question; read it.

The question was read as follows:

"Q. It is 136 feet long. What part of it?"

Mr. HAGNER: I am only asking you where he dredged in 1892. Where did he dredge where the Ellen Tobin was injured in 1892? That is what I am trying to get at.

A. I cannot state exactly, Mr. Hagner. I know that he dredged at that point there, and I am quite sure that he dredged where the vessels lay in loading stone.

Q. Did you not have a contract with him to dredge east of  
831 that place? Was not your contract to dredge east of that place?

A. We never had any what you might call a contract with him. That was the reason we brought him there, to dredge east of that place.

Q. What did you have with him? Did you have an oral agreement?

A. Yes, sir; it was oral.

Q. Did your oral agreement state that he was to dredge east of that place?

A. You are talking about 1892 all the time?

Q. Yes; in 1892.

A. That was a good while ago, Mr. Hagner; I do not like to state positively as to that. I remember that the witness stated in his testimony that he thought he had dredged the year before 1892. He might have stated that. I know he dredged the year before.

Mr. WILSON: The proctors for respondents offer to produce and identify by this witness prints of the Evening Star of the 4th, 5th, and 7th of August, 1893, containing public announcements of the time of the rise and fall of the tides.

Mr. HAGNER: The proctor for the libellants objects to the admission of these papers on the ground that the tides as marked in the Star are taken from but one place, namely, the navy yard, and that it is no evidence whatever of the tides at the wharves in Georgetown what the tides were as shown by the Star, because, as before stated,  
832 if there is a west wind prevailing the several tides going up the Potomac river are retarded and thrown back, and in many instances an entire tide is missed because of the prevalence of the west wind.

The witness produced copies of the Evening Star dated August 4, 5, and 7, 1893, and the respective reports of the condition of the tides as shown thereby are as follows:

*August 4, 1893.*

High tide.

Low tide.

.013 a. m. 12.32 p. m.

6.48 a. m. 6.55 p. m.

August 5, 1893.

High tide.		Low tide.
1.07 a. m. 1.28 p. m.		7.47 a. m. 7.55 p. m.

August 7.

High tide.		Low tide.
3.08 a. m. 3.39 p. m.		10.00 a. m. 10.12 p. m.

CHAS. G. SMITH, JR.,  
By E. L. WHITE, *Sp'l Com.*

833 WILLIAM J. McDEVITT, a witness of lawful age, called by and on behalf of the respondents, having been first duly sworn, is examined.

Mr. HAGNER: I object to the reproduction of this witness on the ground that he has already testified in this case. If counsel can state that they forgot or overlooked anything I shall not object. Otherwise I shall object.

By Mr. WILSON:

Q. You have already been examined in this case?

A. Yes, sir.

Q. Will you state if you have today read the testimony of the captain of the Ellen Tobin relative to the circumstances under which the Tobin was sunk in Smith's wharf in August, 1893.

834 A. I have.

Q. Upon reading that testimony state what, in your opinion as an expert, was the cause of the sinking of the Ellen Tobin in front of Smith's wharf in August, 1893?

Mr. HAGNER: The question is objected to on the ground that the decisions are to the effect that it is not permissible to show after a vessel has been injured on a rock or obstruction in a berth by expert testimony that she was not injured by it—*res ipsa loquitur*, so to speak—and that, therefore, the testimony of this witness is immaterial and incompetent.

A. I think that she was liable to leak, and they neglected to pump her out before they found out that she had too much water in her. The captain states that she was dipped in the head, and of course that threw the water forward. That might have been whether she was loaded in the head or not. It depends upon how she was loaded. Mr. Smith could tell that.

Mr. HAGNER: I note an objection to the witness stating what Mr. Smith has testified to. He is asked a hypothetical question, and it does not make a particle of difference at this late hour of the day and at this late day what Mr. Smith has testified to. The witness can answer or not just as he chooses, but he is not to lug Mr. Smith or anybody else in.

Mr. WILSON: I asked only upon the captain's explanation, his statement of what occurred there.

The WITNESS: Shall I answer that?

Mr. HAGNER: You can answer anything you like.

835 A. My opinion is that he allowed too much water to get into her before he found it out, and when he commenced to pump her out then it was too late; the quantity of water liable to get in allowed her to settle and caused her to leak faster, and after he found that out it was too late.

Cross-examination.

By Mr. HAGNER:

Q. If a vessel drawing 12 feet of water has a rock under her which is only 11 feet 10 inches below the surface, you do not think it at all remarkable that that rock should go through that vessel, do you?

A. No; not if she was drawing 12 feet of water and the rock only 11 feet and a half. Is that what you said?

Mr. HAGNER: Yes.

The WITNESS: The top of the rock would be just above what she was drawing.

Q. And it would not be remarkable that she should hit the rock, would it?

A. No, sir.

Q. It would be remarkable if she should not hit the rock, would it not?

A. It would seem, if the rock was under her, she would hit it.

WM. J. McDEVITT,

By E. L. WHITE,

*Sp'l Comm'r.*

Proctors for respondents announce their testimony closed.

836 It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that the signatures of the witnesses to each and all of the foregoing depositions is hereby waived, and it is expressly agreed by and between the said proctors that the commissioner may sign the depositions of said witnesses.

RANDALL HAGNER,

*Proctor for Libellants and Respondents in Cross-libel.*

NATH'L WILSON,

*Proctor for Respondents and Cross-libellants.*

DISTRICT OF COLUMBIA, ss:

I, E. L. White, the special commissioner duly appointed by virtue of an order passed in the above-entitled cause on the — day of —, 1894, do hereby certify that the foregoing depositions were taken down in shorthand at the time and place mentioned in the caption thereof from the oral statements of said witnesses; that said

witnesses were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters in controversy; that said depositions were thereupon read over by the said witnesses and by them subscribed, except as to those signatures which were attached to the depositions by the commissioner by stipulation and agreement of the proctors of the respective parties.

I further certify that I am not of counsel not in anywise interested in the result of this suit, and that my fees, amounting to \$252, for taking the said depositions, has been fully paid.

E. L. WHITE,  
*Special Commissioner.*

837

## EXHIBIT C. G. S. No. 1.

*Marks.*

Vessel to unload in turn at rate of 50 yds. p'r day or more and to receive demurrage at rate of 7 cts. p'r ton p'r day on registered tonnage of vessel if detained longer; no demurrage to be allowed if vessel cannot lay at wharf.

Shipped in good order and condition by C. G. Smith & Son on board the schooner called the Sunlight, whereof W. H. Green — master for the present voyage, now lying in the port of West Washington, D. C., and bound for Ft. Monroe, Va.—to say, seven hundred (700) tons (more or less) broken stone, being marked and numbered as in the margin, to be delivered in like good order and condition at the aforesaid port of Ft. Monroe, Va. (the danger of the seas only excepted), unto U. S. engineer dep't or assigns, he or they paying freight for the said goods at the rate of fifty (50) — per ton — 2,240 lbs., and discharged by consignee with — per cent. primage and average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others stand void.

Dated West Washington, D. C., Oct. 14, 1892.

WM. H. GREEN.

(Endorsed.)

FORT MONROE, VA., *November 2nd*, 1892.

Received from Chas. G. Smith and Son, per schr. Sunlight, five hundred and forty-two  $\frac{37}{100}$  cu. yds. (542.37 cu. yds.) of broken stone.

JAMES WARE.

Reported Oct. 17.  
W. H. GREEN.

605 tons.  
50

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\$302 50

Paid Nov. 3, '92.

E. B.

JOSEPH H. LEE.

838

## EXHIBIT C. G. S. No. 2.

*Marks.*

Vessel to unload in turn at rate of 50 yds. p'r day or more and to receive demurrage at rate of 7 cts. p'r ton p'r day on registered tonnage of vessel if detained longer; no demurrage to be allowed if vessel cannot lay at wharf.

Shipped in good order and condition by Chas. G. Smith & Son on board the schooner called the A. Denike, whereof Wm. G. Melvirs — master for the present voyage, now lying in the port of West Washington, D. C., and bound for Fort Monroe, Va.—to say, 650 tons, more or less, of broken stone, being marked and numbered as in the margin, to be delivered in like good order and condition at the aforesaid port of Ft. Monroe, Va. (the danger of the seas only excepted), unto U. S. engineer dep't or assigns, he or they paying freight for the said goods at the rate of fifty cts. p'r ton of 2,240 lbs., and discharged by consignee with — per cent. primage and average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others stand void.

Dated West Washington, D. C., M'ch 31, 1893.

WM. G. MELVIRS.

(Endorsed.)

FORT MONROE, VA., *April 12th*, 1893.

Received from Mess. Chas. G. Smith and Son, Washington, D. C., per schr. "A. Denike," (525.77 cu. yds.) five hundred and twenty-five  $\frac{77}{100}$  cubic yards of broken stone.

JAMES WARE.

587 tons.

50

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\$293 50

35 off adr. capt'n.

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258 50

Paid April 15, '93.

JOSEPH H. LEE.

Please pay within freight to Joseph H. Lee.

WM. G. MELVIRS.



839

## EXHIBIT C. G. S. No. 3.

*Marks.*

Vessel to unload in turn at rate of 50 yds. p'r day or more & to receive demurrage at rate of 7 cts. p'r ton p'r day on registered tonnage of vessel if detained longer; no demurrage to be allowed if vessel cannot lay at wharf.

Shipped in good order and condition by Charles G. Smith & Son on board the 3-mast schooner called the Jno. R. Fee, whereof Loveland — master for the present voyage, now lying in the port of West Washington, D. C., and bound for Fort Monroe, Va.—to say, five hundred and twenty (520) tons, more or less, of broken stone, being marked and numbered as in the margin, to be delivered in like good order and condition at the aforesaid port of Fort Monroe, Va. (the danger of the seas only excepted), unto U. S. engineer dep't or assigns, he or they paying freight for the said goods at the rate of fifty (50c.) cts. per ton of 2,240 lbs., discharged by consignee.

In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others stand void.

Dated West Washington, D. C., July 8th, 1892.

A. T. LOVELAND.

(Endorsed.)

FORT MONROE, VA., July 16th, 1892.

Received 473.77 cu. yds. of broken stone.

JAMES WARE.

1,705

528

2,240 tons.

50

\$264 00

40

\$264 40 p'd July 18, '92.

840

## EXHIBIT C. G. S. No. 4.

*Marks.*

Vessel to unload in turn at rate of 50 yds. p'r day or more & to receive demurrage at rate of 7 cts. p'r ton p'r day on registered tonnage of vessel if detained longer; no demurrage to be allowed if vessel cannot lay at wharf.

Shipped in good order and condition by Chas. G. Smith & Son on board the schooner called the Henry D. May, whereof Truitt — master for the present voyage, now lying in the port of West Washington, D. C., and bound for Fort Monroe, Va.—to say, 490 tons, more or less, of broken stone, being marked and numbered as in the margin, to be delivered in like good order and condition at the aforesaid port of Fort Monroe, Va. (the danger of the seas only excepted), unto U. S. engineer dep't or assigns, he or they paying freight for the said goods at the rate of two hundred and thirty-seven &  $\frac{50}{100}$  (\$237.50) lump sum.

In witness whereof the master or purser of the said vessel hath affirmed to 3 bills of lading, all of this tenor and date, one of which being accomplished the others stand void.

Dated West Washington, D. C., Nov. 19th, 1892.

E. S. TRUITT.

(Endorsed.)

FORT MONROE, VA., *November 28th*, 1892.

Received from Chas. G. Smith and Son, Washington, D. C., per schooner Henry D. May (389.26 cu. yds.), three hundred and eighty-nine  $\frac{26}{100}$  cubic yards of broken stone.

JAMES WARE.

841

EXHIBIT C. G. S. No. 5.

*Marks.*

Vessel to unload in turn at rate of 50 yds. p'r day or more and to receive demurrage at rate of 7 cts. p'r ton p'r day on registered tonnage of vessel if detained longer; no demurrage to be allowed if vessel cannot lay at the wharf.

Shipped in good order and condition by Chas. G. Smith & Son on board the schooner called the Mattie B. Russell, whereof Collins — master for the present voyage, now lying in the port of West Washington, D. C., and bound for Ft. Monroe, Va.—to say, five hundred and fifty tons, more or less, of broken stone, being marked and numbered as in the margin, to be delivered in like good order and condition at the aforesaid port of Ft. Monroe, Va. (the danger of the seas only excepted), unto U. S. engineer dep't or assigns, he or they paying freight for the said goods at the rate of fifty cts. per ton of 2,240 lbs., & discharged by consignee, with — per cent. primage and average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others stand void.

Dated West Washington, D. C., Dec. 6th, 1892.

D. COLLINS.

(Endorsed.)

ENGINEER OFFICE, FORT MONROE, VA., *December 16th*, 1892.

Received from Chas. G. Smith and Son, Washington, D. C., per schooner Mattie B. Russell, four hundred and forty-nine  $\frac{22}{100}$  cu. yds. of broken stone.

JAMES WARE.

501 tons.

50

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\$250.50

Paid Dec. 21, '92.

JOSEPH H. LEE, E. B.

842

## EXHIBIT C. G. S. No. 6.

*Marks.*

Vessel to unload in turn at rate of 50 yds. p'r day or more and to receive demurrage at rate of 7 cts. p'r ton p'r day on registered tonnage of vessel if detained longer; no demurrage to be allowed if vessel cannot lay at the wharf.

Shipped in good order and condition by Chas. G. Smith & Son on board the schooner called the S. B. Wheeler, whereof Godfrey — master for the present voyage, now lying in the port of West Washington, D. C., and bound for Ft. Monroe, Va.—to say, 425 tons, more or less, of broken stone, being marked and numbered as in margin, to be delivered in like good order and condition at the aforesaid port of Ft. Monroe, Va. (the danger of the seas only excepted), unto U. S. engineer dep't or assigns, he or they paying freight for the said goods at the rate of fifty cts. p'r ton of 2,240 lbs., and discharged by consignee.

In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others stand void.

Dated West Washington, D. C., Dec. 15th, 1892.

RUFUS GODFREY.

(Endorsed.)

FORT MONROE, VA., Dec'r 31st, 1892.

Received from Chas. G. Smith and Son, per schooner S. B. Wheeler, three hundred and eighty-four  $10\frac{2}{3}$  cubic yards of broken stone.

JAMES WARE.

429 tons.

50

214.50 fr't.

15.55 Lee.

198.95

Received payment.

Jan. 4, '93.

JOS. H. LEE.

843

## EXHIBIT C. G. S. No. 7.

Loading on vessels & scows about 3,000 tons of stone, at 20 cts.....	600 00
Running crusher for 63 days, as shown on time book, from Aug. 7th to Nov. 17th, at an additional cost of loading tubs from scows, of loss of time at low tide and loss of stone by same falling in water, and cutting down capacity of machine, at 20.00 a day .....	1,260 00
Damage to scow by same catching on anchor and sinking..	200 00
To loss of stone by scow outside dumping and damage to scow.....	400 00
	<hr/> 2,460 00

844

## EXHIBIT C. G. S. No. 8.

WASHINGTON, D. C., — —, 1893.

Schooner Ellen Tobin, sunk at wharf Sunday, August 6th, 1893,  
between the hours of —.

(Statement of Chas. G. Smith, Jr.)

On Friday, when the Tobin was partly loaded, I had conversation with the captain in Lee's store, and in the presence of Jos. H. Lee, who heard the conversation. In this interview I stated to the captain that it would be wise to sound around his vessel and make sure that she was laying all right. The capt. said it would not hurt to lay on the bottom slightly, and referred to the "Sunlight," a large-vessel than his, having loaded there last year. I said in reply to this that it was usual for the captains to look out for *there* vessels, and that while the dock had been dredged out since the vessel "Sunlight" had loaded, at the same time I did not know just what the bottom was, but thought it all right, but would advise him to sound, and I would tell the foreman to carry out any instructions that he (the captain) might give as to loading or not loading, and that he would if necessary help him shift. I also stated that we finished loading the "Sunlight" with wheelbarrows instead of running direct from the chute. Capt. Lee also told the captain to look out for their vessel, and that he would assist them in any way, but that he had better satisfy himself, &c.

On the same evening I had a conversation with Mr. Speaker, the foreman of the crusher, and told him also to tell the captain of the Tobin that he had better sound around the vessel and make  
845 sure that it was laying all right. Mr. Speaker said the vessel was laying all right, but he would tell the captain.

I saw Speaker again on Saturday morning, August 5th, before leaving for the country, & reminded him about telling the capt., &c. He said he had done so and would do so again. I told him to be particular to leave the vessel in good shape to lay over Sunday & do anything that the captain of the schooner requested him to do and put another scow in if he wanted. I also sent note to quarry to Foreman Broughton, telling him to send down a long tree for a pole to shore the vessel off. This was done. At about 5 p. m. Saturday evening, the tide being nearly low, the captain said he was touching bottom slightly, and Speaker immediately stopped loading and shut down for the night. The captain of Tobin then said that he was laying all right for the present, & that he would shove off on the high water. Speaker then hauled another light scow to a convenient position for the capt. to get at, so that he could put this additional scow between vessel and wharf when he shoved off on high water. It was understood between the captain of the Tobin & Speaker that he would do this, so that his safety would be assured. Speaker also told the captain at this time that if necessary we could wheel a part of his cargo on in case he thought it

best, and that we had done so in several other cases. The captain said she was leaking, and that he did not want to get vessel tipped forward so that water would get away from pump, and requested that the iron shoot be taken off so that it would not interfere with his shoving off at high water. Speaker then called back the men, who had quit work and were at the office getting their money, and had the iron shoot taken off. He also told the captain that he had

846 wheeled about 125 tons in the "Sunlight," and that she, the "Sunlight," had two scows between her & the wharf, and that if necessary we could do the same way with him, to which he made no reply. Speaker then left for the night, with the distinct understanding that the vessel was laying all right for the present, and that he, the captain, would shove off & put in the other scow on the high water.

The watchman, Krone, reported that there was no one stirring on the vessel Saturday night and no efforts made to shove her off on the high water. The captain said to me on Monday night that as far as he knew the vessel was afloat on high tide Saturday night, and that she was laying all right when our men stopped work. Ike Taylor, who was trimming the vessel, states that she was leaking Saturday afternoon, and that there was water on her ceiling. The other trimmers confirm this report. Ben. Naylor, the Sunday watchman, states that there was no one stirring on board the Tobin Sunday morning early, and that she seemed to be laying all right. About half past eight he noticed that something was wrong with the vessel, & the mate, then coming on deck, found that she was making water and started the pumps. The vessel then seemed to sink steadily & the water gain until afternoon, when no further effort seemed to be made.

Several men were pumping vessel during Sunday morning, and it does not appear that the vessel sunk on the rock until she had made some water. On Saturday the capt. found by soundings with his lead line that there was only about 9 ft. of water at his stern, & on his request stern was shoved off promptly. The vessel at the

847 time she sunk drew only about 12 ft. of water and larger vessels have been loaded at this point. The night watchman,

Krone, states positively that there was no one visible on deck of vessel during Saturday eve. or night, and that no one made any effort to shove the vessel off on high tide, which was about twelve o'clock that night. He said one of the vessel's crew came aboard about 12 o'clock, but made no inquiry about condition of vessel, nor did the capt. make any inquiries of him or ask him to call him at high tide. As the vessel was not loaded any further after 5 p. m. Saturday night she must have laid without sinking over low tide Saturday night and Sunday morning.

H. P. Gilbert and others, who have known the wharf for many years, can testify as to its being tho't safe.

(Here follows exhibit marked p. 848.)

*Measurements of Scows.*

Scow No.	Width.
1.....	20 ft.
2.....	16' 9"
3.....	26 ft.
4.....	Not in use for more than a year.
6.....	20 ft.
7.....	20 ft.
8.....	20 ft.
9.....	20 ft.
10.....	20 ft.
11.....	20 ft.
14.....	20 ft.
15.....	20 ft.
16.....	20 ft.
17.....	18' 2"

All of the above measured by C. G. Smith, Jr. Scows #3, #5, #12, #13 could not be measured, being out of reach. Capt. of tug's measurement is 20 feet for each. Neither scows #2 or #17 or #3 were at wharf on Sunday, Nov. 18th, at any time during that day.

Scows #3 and #17 were across the river, on the flats, for repairs.  
Scow #2 was at Little Gulf quarry, partly loaded with stone.

C. G. SMITH, Jr.

Dec'r 12th, 1894.

*Motion for Leave to Amend.*

Filed Apr. 27, 1895.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT *et al.*

*vs.*

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR.

} In Admiralty.  
No. 379.

And now come the libellants and move the court to be allowed to amend their libel filed in this cause in a merely formal matter by adding in the 4th paragraph to said libel, in the 14th line of said paragraph, after the words "as aforesaid," the following words: "And solely and only on account of and by reason of said negligence and want of care of said Charles G. Smith and Charles G. Smith, Junior, and their agents."

And, further, by adding at the end of said 4th paragraph of said libel the following words: "That the loss and injuries aforesaid were caused by the said negligence and want of proper care on the part of the said Charles G. Smith and Charles G. Smith, Junior, and their agents, and not from any omission or neglect on the part of said vessel the 'Ellen Tobin,' her owners, master, or crew."

RANDALL HAGNER,

*Proctor for Libellants.*

Messrs. Nathaniel Wilson and Job Barnard, proctors for respondents.

GENTLEMEN: Take notice that I shall on Monday, April 22d, 1895, at the coming in of the court, at 10 o'clock of the morning of that day, or as soon thereafter as counsel can be heard, call up the within motion for hearing before Mr. Justice Cox, holding the district court.

RANDALL HAGNER,  
*Proctor for Libellants.*

Copy served on Mr. Nathaniel Wilson and Mr. Job Barnard Thursday, April 18th, 1895.

R. H.

852

*Testimony in Rebuttal.*

Filed April 19, 1895. J. R. Young, clerk.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i> , Owners of the Schooner "Ellen Tobin," Libellants, <i>vs.</i>	} In Admiralty. No. 379, District Court Docket No. 1.
CHARLES G. SMITH and CHARLES G. SMITH, JR., Respondents.	

DISTRICT OF COLUMBIA, ss:

Be it known that at an examination of witnesses begun and held on February 13th, 1895, and continued from time to time by adjournment, within noted, until the 13th day of April, 1895, when the depositions hereto attached were taken, I, Rutledge Willson, a special commissioner under and by virtue of the order duly made and entered in this cause, did cause to be personally present at my office, No. 406 Fifth St. N. W., Washington, D. C., Louis E. Broom, Charles J. Pierson, Albert M. Olson, John Hankins, John B. Lord, J. M. Walter Altee, Louis Hines, Walter P. H. Crews, John A. Curtis, Charles J. Fox, John B. Lord, Jr., Charles E. L. B. Davis, Abraham Kroom, Henry A. Wise, Stephen W. Smith, Thomas Berry, Randall Hagner, Earnest G. Lord, and Henry W. Brewer to testify on behalf of the libellants in rebuttal in a certain cause now pending in the supreme court of the District of Columbia, in the district side thereof, in admiralty, and being No. 379 in docket No. 1 on said district side of said court, wherein Charles Burnett and others are libellants and Charles G. Smith and Charles G. Smith, Jr., are respondents.

RUTLEDGE WILLSON,  
*Special Commissioner.*

853 DISTRICT OF COLUMBIA, ss:

I, Rutledge Willson, a special commissioner under the orders aforesaid made and entered, do hereby certify that in pursuance of notice to and stipulation between counsel for the respective parties to this suit the depositions hereto attached and as therein will ap-



pear were taken down by my clerk, who was duly sworn to correctly take in shorthand and transcribe the same, in the presence of and from the oral statements of the witnesses, at the times and place designated in the caption hereto, and which said depositions are subscribed by me for the witnesses respectively, as stipulated between counsel for the respective parties on the last page of said depositions, being number 187, all of said witnesses being first duly cautioned and by me first duly sworn to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause. All of the exhibits offered in this testimony, to wit, Exhibits John Hankins Nos. 1 and 2, Exhibit No. 1, Davis; Exhibits Wise Nos. 3 and 4, and Exhibit Brewer No. 1, are filed herewith in a separate package.

I also certify that I am not of counsel for any of the parties to said cause nor in any manner interested therein.

RUTLEDGE WILLSON,  
*Special Commissioner.*

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*Libelants' Testimony in Rebuttal.*

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	} In Admiralty. No. 379.
<i>vs.</i>	
CHARLES G. SMITH, SR., <i>et al.</i>	

WASHINGTON, D. C., February 13th, 1895.

Met, by consent of counsel for respondents, at the office of Rutledge Wilson, special commissioner, No. 406 5th St. N. W., Washington, D. C., for the purpose of taking testimony on behalf of libelants in rebuttal.

Present: Randall Hagner, Esq., proctor for libelants; Mr. Nathaniel Wilson and Job Barnard, proctors for respondents, and—

LEWIS E. BROOM, a witness produced by libellants, being first duly sworn, on his said oath did depose and say as follows:

Examined by Mr. HAGNER:

Q. Mr. Broom, state your name, residence, and occupation.

A. Lewis E. Broom; residence, 1123 Patapsco St., Baltimore; occupation, wrecker.

Q. State if today you were over in Georgetown, in front of Mr. Smith's elevator.

A. Yes, sir.

Q. Did you see Captain Hankins and myself make measurements over there?

A. Yes, sir.

Q. Do you know how far you made a mark on the ice out in the river from the east end of the elevator?

855 A. It was forty-one feet.

Q. You saw us make the measurements?

A. Yes, sir.

- Q. And what the tape-line indicated ?  
A. Yes, sir; forty-one feet.  
Q. We measured with a tape-line, did we ?  
A. Yes, sir.  
Q. What did you do then ?  
A. I cut a hole right there and had a diver to go down.  
Q. How large a hole did you cut ?  
A. About four feet square.  
Q. And did you attend the pump while the diver was down ?  
A. Yes, sir.  
Q. Do you remember attending a pump in January, this month just passed ?  
A. Yes, sir.  
Q. When was that ?  
A. Jan. 4th.  
Q. And who went down on that occasion ?  
A. Ms. Chas. Pierson.  
Q. That was on Friday, Jan. 4, 1895 ?  
A. Yes, sir.  
Q. And you attended him while he went down ?  
A. Yes, sir.  
Q. On the occasion of your going down today, what was the name of the diver ?  
A. Albert Olson.  
Q. Was that the name of the diver who went down today ?  
A. Yes, sir.  
Q. Mr. Broom, do you remember we made an allowance for a little bend in the tape measure, on account of the wind, of two inches ?  
856 A. Yes, sir.  
Q. And the wind was blowing from what direction ?  
A. I judge it was nor'west.  
Q. And of course that bent the line towards the southeast ?  
A. Yes, sir.  
Q. And we allowed two inches on account of the bend in the line on account of the wind ?  
A. Yes, sir.  
Q. Do you think that is a fair proportion ?  
A. Yes, sir.

Cross-examination by Mr. BARNARD :

- Q. Mr. Broom, did you take more than one measurement ?  
A. That is all I attended to—the one measurement.  
Q. Did you see any other measurements made ?  
A. Yes, sir; I saw them measure.  
Q. When was that ?  
A. Just before this last measurement I spoke of.  
Q. Where was that from and where to ?  
A. It was about 20 feet or 30 feet further up the river.  
Q. What point did it reach in the river ?  
A. I was dressing the diver. While that was going on I hap-

pened to glance that way and saw them measure. I don't know what that was done for or anything about it.

Q. Do you know what distance that was?

A. No, sir; I don't.

Q. What is your business, Mr. Broom?

A. I am in the wrecking business—raising vessels.

Q. How long have you been in that business?

A. Twenty or twenty-five years.

Q. Do you go down yourself as a diver?

857 A. Yes, sir; I have been down.

Q. But you didn't go down in this case?

A. No, sir; not on this wreck.

Q. Do you go down usually or is it your business to look after the divers that are down?

A. I usually attend to them. I only go down when I haven't a diver to do the diving.

Q. Where do you live?

A. In Baltimore.

Q. Who is Albert Olson?

A. A diver who is working for me.

Q. How long has he been working for you?

A. About two years, I suppose.

Q. Where does he live?

A. He lives in Baltimore.

Q. Has he been diving for you all that time?

A. No, sir; he has been diving off and on.

Q. Have you instructed him in that business or had he known anything about — when he came to you?

A. I don't know whether he had done any diving outside of what he done for me. He has done considerable for me and he satisfies me with his work.

Q. How much experience has he had as a diver to your knowledge?

A. I suppose the diving he has done for me would be about three months' diving work.

Q. In the two years?

A. Yes, sir.

Q. Where has that diving been done?

A. He was diving two weeks on the U. S. sloop "Dale" here a few weeks ago, sunk in Baltimore. Mr. Pierson and Olson both did the diving there, and it took them about two weeks to do it.

858 Q. What were you doing in reference to that; raising the vessel or unloading it?

A. No; she was sunk and we had to shut up the leaks, windows, and ports in order to pump her out. Then we were rebuilding two railways.

By Mr. HAGNER:

Q. A marine railway?

A. Yes, sir.

Q. How long ago was that, Mr. Broom?

60—582

A. The Dale?

Q. The railways I am speaking about.

A. It was in the fall and as far as the winter of this year.

By Mr. HAGNER:

Q. Of this last year?

A. Yes, sir.

Q. How long has Mr. Pierson worked for you?

A. Well, he has worked for me ten or twelve years.

Q. Has he been diving all that time?

A. Well, he has done his portion of it. He has been diving all the time he worked for me. I do other work besides. He did his share of what was going on.

Redirect examination by Mr. HAGNER:

Q. Mr. Broom, who had the contract for raising the sloop Dale?

A. I did.

Q. You were the contractor?

A. Yes, sir.

Q. And you were intrusted for that work by the Government officers, were you?

A. No, sir. Capt. Emerson was the one I contracted with.

Q. Who is Captain Emerson?

A. He has charge of the "Dale" in Baltimore.

Q. Is he a Government officer?

859 A. I don't think he is. He manufactures bromo-seltzer; he is the originator of that. He has a factory there in Baltimore.

Q. He took the contract from the Government and you contracted with him to raise it?

A. He has charge of this naval reserve. The Government has given this vessel to carry on the naval reserve.

Q. What is it, a naval hospital?

A. It is a naval reserve. There are near two hundred applicants there to be drilled and put through.

Q. Is it a training school?

A. Yes, sir. It has not got anything to do with the State of Maryland. It is the United States Government matter. It is a United States Government training school. The ship was given to the State.

Q. It is a State institution, then, and the ship has been loaned by the Government to the State?

A. It is something similar to the 4th or 5th Maryland, a kind of militia. Instead of being military it is marine business.

Q. Will you say whether or not you ever had anything to do with the "Ellen Tobin"?

A. I came there to attend to the suction hose pumping the stone out of her.

Q. For John B. Lord?

A. Yes, sir.

Q. You were contracting there for Mr. Lord, were you?

A. Yes, sir.

Q. And you became familiar with Mr. Smith's stock and elevator there?

A. Yes, sir.

Q. You knew the ground?

A. Yes, sir.

At the same time and place and in the presence of the same counsel also appeared CHARLES J. PIERSON, a witness produced on behalf of the libellants, who, being duly sworn, on his said oath doth depose and say.

Examined by Mr. HAGNER:-

Q. Mr. Pierson, you have testified before in this case, have you?

A. Yes, sir.

Q. Capt. Broom says he attended you on the 4th of January when you went down in front of Mr. Smith's elevator, the east end of it.

A. Yes, sir.

Q. Will you state whether or not you went to the place where the rock was of which you made this model formerly, the model being marked "Libellants' Exhibit 6"? State whether you went to that rock or the location at which you went down on the 4th of Jan., 1895.

A. Yes, sir; we were there in front of the stone yard on that date, the 4th of Jan.

Q. Do you remember at all how far we measured out when you went down? You don't remember that.

A. No, sir; I saw you measuring, but I don't know what it was.

Q. Did you find any part of that rock there when you went down on the 4th of Jan?

A. Yes, sir.

Q. What part of it did you find there, or did you find it in the same condition as when you went down before?

A. No, sir.

Q. What condition did you find it on the 4th of Jan., 1895?

A. I found a rock about three feet or three and a half feet.

Q. High?

A. High, and about thirty feet long on the face, and it was spalded, as it seems to me it had been tampered with, since the last time I visited it.

Q. How, in your opinion, had it been treated?

A. Well, I found it where at first it was smooth rock, now it is rough as if it was broke. I found it was broke in several places, as if it had been exploded.

Q. As if it had been exploded?

A. It seemed that way to me.

Q. Did you find the comb of it which is there (indicated on the model) as the highest point on the rocks?

A. I found part of it; not all of it.

Q. You say that the height of it is now about three feet six from the bottom of the river?

A. Something like that.

Q. You testified before it was between five and six feet from the bottom of the river?

A. Yes, sir; that is, if you measure it. It was not straight up exactly five or six feet high; it was in a slanting position just the same as the model.

Q. As you testified before?

A. Yes, sir.

Q. Could you state whether or not the base of the rock, what was left of it, seemed to be split or shattered?

A. In places it was shattered; yes, sir.

Cross-examination reserved until tomorrow, Feb. 14, 1895,  
862 at th-ee o'clock, and—

ALBERT M. OLSON, a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Examined by Mr. HAGNER:

Q. What is your age, Captain?

A. I will be thirty-five the fifteenth of this month.

Q. Where do you reside?

A. In Baltimore.

Q. How long have you been living there?

A. Ten years.

Q. What is your occupation, Captain?

A. Working at wrecking.

Q. How long have you been engaged at that?

A. About two years, or probably a little over.

Q. What were you doing prior to that time?

A. I was wharf-building.

Q. How long were you wharf-building?

A. About five years.

Q. Will you state where you were today in conducting your business as a diver? Were you with Capt. Broom?

A. Yes, sir.

Q. Were you in front of Mr. Smith's wharf, the wharf over in Georgetown where there is an elevator and stone-crushing apparatus?

A. Yes, sir.

Q. Did you go down, sir?

A. Yes, sir.

Q. Did you go down in a hole in the ice?

A. Yes, sir.

Q. How long were you down?

863 A. Well, I guess about fifteen or twenty minutes; something of that kind.

Q. How did you go down in the river?

A. I went down on a ladder.

Q. Where was the ladder put?

A. In a hole through the ice.

Q. What direction did you go in when you got to the foot of the ladder?

A. I went across the river.

Q. In the direction of crossing the river?

A. Yes, sir.

Q. Out from the wharf, then?

A. Out from the wharf.

Q. And out from the hole in the ice towards the middle of the river?

A. Yes, sir.

Q. What did you find down there?

A. I found a rock.

Q. What was the shape of the rock—was it round or flat?

A. It was a kind of flat like on top.

Q. A kind of flat on top?

A. Yes, sir.

Q. Was it smooth on top or was it in ridges?

A. No; it was not smooth.

Q. How would you describe it? To begin with, how far from the foot of the ladder did you find that rock, about?

A. I guess about some between three or four feet.

Q. From the foot of the ladder?

A. Yes, sir.

Q. Did you find out how long the rock was?

A. I went from one end to the other.

864 Q. Could you tell pretty well about how long it was?

A. Well, I guess it must have been thirty or thirty-two feet. It might have been a little over.

Q. It might have been a little over?

A. It might be a little more or a more less.

Q. How high did it seem to be from the bottom of the river, Captain?

A. Between three and four feet.

Q. From the bottom of the river?

A. Yes, sir.

Q. Did you notice the character of the bottom there; what sort of bottom it was between the ladder and the wharf?

A. Yes, sir.

Q. What sort of a bottom was it?

A. It was a muddy kind, like old straws and things mixed up there; old manure like.

Q. Straws and stuff?

A. Yes, sir.

Q. What do you suppose that was? Could you tell at all?

A. No, sir.

Q. It was soft stuff?

A. Yes, sir; soft stuff.

Q. Could you tell about how wide the rock was, the flat rock?

A. Probably twelve, probably more; I could not exactly say.

Q. Twelve feet wide?

A. Yes, sir.



- Q. It might have been a little more?  
A. Yes, sir.  
Q. Did you bring anything up with you when you came up?  
A. Yes, sir.  
Q. What is that, Captain, the thing I hand you now?  
A. That is a piece of rock.  
865 Q. Have you seen that before?  
A. Yes, sir.  
Q. Where did you see it?  
A. I saw it on the ice.  
Q. Is that the piece of rock you brought up with you?  
A. Yes, sir; that is the piece.  
Q. Where did you find that piece of rock, Captain?  
A. On the top of the rock—that is, down on the bottom.  
Q. Captain, you say you found that piece of rock you hold in your hand on the top of the rock you have been describing, which lay at the bottom of the river. Will you state whether you found it lying flat on the rock or whether you found it in any indentation or crevice of the rock or cleft.  
A. It was in this shape in a cleft of the rock.  
Q. And you then immediately brought it up with you, did you?  
A. Yes, sir.  
Q. Did the rock seem to be one solid mass?
- Mr. BARNARD: I object to that question.
- Q. I withdraw that question. What was the condition of the rock?  
A. How do you mean?  
Q. Well, was it an entire rock, smooth all the way across, or was it rough?  
A. No, sir; it was rough.  
Q. Did it seem to be whole or otherwise?  
A. Holes in it.  
Q. Holes along on it—indentations?  
A. Yes, sir.  
Q. Do you mean to say the rock was split or not?  
A. It seemed to have been battered out or something.  
866 Q. Broken?  
A. Broken.  
Q. Did it have any such comb on it as on that model?  
A. Yes, sir.  
Q. What part of it had the comb on it?  
A. This here part (indicating the end).  
Q. What was the condition of the other part?  
A. Flat.  
Q. You went straight out from the wharf from the foot of the ladder?  
A. Yes, sir.  
Q. And you reached the rock in that way?  
A. Yes, sir.

Q. And you think that was only three or four feet from the foot of the ladder?

A. Yes, sir.

Mr. HAGNER: I want to offer this piece of rock in evidence and have it marked as "Exhibit Olson No. 1."

Mr. BARNARD: I object to that rock being offered in evidence, it being no part of the rebuttal testimony in this case—not proper rebuttal.

The Exhibit Olson No. 1 is filed separately.

Q. You say there were clefts in it? Could you state about how many clefts there were in the rock?

A. No, sir.

Q. Were there several or only one?

A. There was right smart of them.

Q. There was right smart of them?

A. Yes, sir.

Q. I want to ask you if before going down I represented  
867 to you that it had been stated by Mr. Pierson, who had gone down on the 4th of Jan., that he had found the rock in *spalds*, and I wanted you to make an examination to find whether or not that report was correct. You remember my stating that to you?

A. Yes, sir.

Mr. BARNARD: The last question and answer are objected to as being wholly incompetent.

Q. Have you had sufficient experience or information on the subject to be able to say from your examination there whether Mr. Pierson's statement, that the rock looks as if it had been exploded, was correct or not?

A. Yes, sir.

Q. You think that is a fact, do you?

A. Yes, sir.

Q. Do you or not pretend to say that that piece of stone you exhibited here belonged to that rock? You don't mean to say that that piece belonged to that rock; you don't know anything about it.

A. No.

Mr. WILSON: The question is objected to as incompetent and leading.

Q. You simply found it about north of the rock, in one of the clefts of the rock.

A. Yes, sir.

Q. You don't pretend to say anything about it?

Mr. WILSON: The question is objected to as leading and incompetent.

Cross-examination reserved until tomorrow, Feb. 14, at 3 o'clock.

Whereupon an adjourment was taken, to meet on Thursday,  
868 Feb. 14, 1895, at 3 o'clock p. m.

FEBRUARY 14th, 1895—3 o'clock p. m.

Met pursuant to adjournment last noted.

The witnesses examined yesterday being produced and presented for cross-examination by counsel for respondent, whereupon CHARLES J. PIERSON was cross-examined by Mr. Wilson :

Q. Mr. Pierson, you have been examined before in this case ?

A. Yes, sir.

Q. How many times ?

A. With yesterday, the third time.

Q. What have you been doing since you were examined last ?

A. Working at wrecking.

Q. Where have you been at work ?

A. Different places ; down the bay and up the bay, and up at Spring garden.

Q. Down in the water ?

A. Yes, sir.

Q. Where did you go down in the water ?

A. I went down on the man-of-war " Shoals " and at Spring garden. A man-of-war sloop was sunk there by the name of " Dale."

Q. Do you remember going down to examine the Ellen Tobin on Thanksgiving last.

A. Yes, sir.

Q. What day ; before or after ?

A. I remember I was there on the fourth of last month, January, about that.

Q. Do you remember being there before that ?

869 A. Yes, sir.

Q. When was that ?

A. I think that was in November.

Q. What time ?

A. I disremember the date.

Q. Who was with you when you went down ?

A. Me and Mr. Nicholas Harp.

Q. Any one else ?

A. We hired a man to pump who was a stranger to us.

Q. Where is he now ?

A. I don't know.

Q. Where is Mr. Harp now ?

A. In Baltimore.

Q. Whose employ is he in now ?

A. Tyler's.

Q. Where ?

A. Tyler's box factory.

Q. When you went down in November do you remember where you went down from ?

A. Yes, sir.

Q. Where ?

A. Off a lighter.

Q. Do you remember where the lighter was in reference to the chute ?

Mr. HAGNER: I note an objection to all these questions for the reason that all that has been gone into. The testimony is all here in this case, and it is not necessary to go back to the former testimony and go all over it again. I object to it as irrelevant and immaterial.

Q. There is in evidence on behalf of the libellants a drawing marked "Exhibit No. 7." I wish you would mark on that drawing, in respect to the wharf, where it was you went into the water on last November a year ago.

A. I don't understand the drawing. I can answer I went down off the lighter. There was two lighters in between the wharf, and I went down off the second one. I ain't up to that kind of stuff.

Q. Can you mark on that map the place you went into the water with reference to the wharf? Can you read and write?

A. Yes, sir.

Q. Can you see that place marked "elevator"—do you see that?

A. Yes, sir.

Q. Now mark on that map with a pencil the place you went into the water, in reference to that elevator, in November a year ago.

A. I don't quite understand; that is not my business. I know I went down off the lighter on a ladder, and I know how far it was off from the wharf, but this kind of work I don't quite understand—about the map and those things.

Q. You cannot mark on that map where it was in reference to that elevator that you went into the water in November a year ago?

A. I could map it out if it was plainer, but I don't understand this.

Q. You don't understand that?

A. I don't understand that.

Q. And you cannot mark on the map where it was you went into the water?

A. No—on that map.

Q. Do you remember where the lower end or the east end of the elevator was?

A. Yes, sir.

Q. In reference to that elevator where did you go into the water?

A. I judge it was about ten feet below that.

871 Q. Ten feet below the elevator?

A. Yes, sir.

Q. And do I understand you to say that there were two scows there between the wharf and the channel outside?

A. I disremember now. I am not certain whether there were two. I disremember.

Q. You don't remember whether there were two?

A. I know there was one, but I ain't certain about two.

Q. What is your best recollection about that?

A. Very likely there was only one.

Q. Very likely there was only one?

A. Yes, sir.

Q. And you went off of the lighter on the outside of the lighter?

A. Yes, sir.

Q. Can you mark on that map where the east end of the lighter was *was* that you went off?

Mr. HAGNER: I object to that question on this ground, that this gentleman in his original testimony has never been asked anything about where he went down, for the simple reason that I depended upon Capt. Hankins and other witnesses to locate where he went down, and we had that measured. His business is a diver, and he had nothing to do with measuring on that occasion.

A. It was to the eastward of the crusher, but I didn't pay much attention. My business, as Mr. Hagner says, is to go down and examine that rock, and I paid very little attention to it.

Q. Your business was to go down and examine that rock?

A. Yes, sir.

Q. Did you know there was a rock there?

A. No, sir.

872 Q. Did Mr. Hagner tell you?

A. No, sir.

Q. Who did?

A. I *left* it with my hands.

Q. Did any one tell you before you went down there was any rock there?

A. No, sir.

Q. You never knew there was a rock there?

A. No, sir.

Q. And never heard there was a rock there?

A. I may have heard it; I don't know.

Q. Did you or not? What is your best recollection?

A. I heard that was the cause of her sinking—the cause of the boat sinking.

Q. Who did you hear that from?

A. I disremember.

Q. You testified before you went down off the lighter, didn't you?

A. Yes, sir.

Q. How far was it where you went down, from the wharf?

Mr. HAGNER: I object to the question on the ground that the counsel had full opportunity to cross-examine this witness, and he did so to the utmost, and now since the witness has been down three times he is very likely to be confused on account of having been down three times, and I therefore object to that.

A. As I said before, I didn't pay any attention about measuring. I had my mind occupied on the work, and that was to examine this stone in front of that dock. I don't care to answer questions. I am not fully prepared to answer.

873 Q. You testified you found a stone about eight feet from the ladder, didn't you—about six or eight feet from the ladder?

A. About six or eight feet from the ladder.

Q. From the foot of the ladder?

A. Yes, sir.

Q. You testified that?

A. Yes, sir.

Q. How far was the stone from the edge of the wharf?

A. I don't know anything about that. I can answer from the bottom of the ladder to the stone.

Q. That is all you can say?

A. Yes, sir.

Q. The next time you went down was the fourth of Jan.?

A. Yes, sir.

Q. Did you go down from the same spot you went down from before?

A. No.

Q. You did not?

A. No.

Q. How far was it from the spot where you went down November a year ago to the spot you went down on the 4th of January?

A. I went down on a ladder lashed to a lighter on the first occasion, and the second occasion the ladder was resting on the edge of the ice. How far it was I don't know.

Q. Have you any idea?

A. Well, I don't know.

Q. You cannot state? Twenty or thirty feet?

A. It might have been about that.

Q. That is, down the river?

A. Yes; that is about on a line ten feet from where the ladder was; ten or fifteen feet from there down the river.

Q. Down the river?

A. Yes, sir; not going towards the bridge, but from the bridge.

874 Q. On the east side?

A. On the east side.

Q. Can you mark on this Exhibit "No. 7" the place on the wharf from which you went down on the 4th of Jan. last?

Mr. HAGNER (to the witness): The elevator is here and the piling is here and the river out there (explaining on the drawing).

A. I disremember correctly, but I think it was on the upper side of the first piling from the elevator. Say here is the elevator and this is the pile.

Q. Between the elevator and the first pile?

A. The first pile.

Q. Sure of that, are you?

A. I am not sure, but I think so.

Q. Who was present when you went down on the 4th of Jan.?

A. Mr. Broom and Mr. Olson.

Q. Anybody else?

A. Mr. Hagner and some other gentleman. I don't know his name.

Mr. HAGNER: I want to state here on the record that it is hardly worth while to spend time with this witness as to where he went down. I have disinterested third parties to certify in respect to where he went down. On the occasion of his going down on the 4th of Jan. I had an engineer to be present, and he will testify where he went down. I have not yet had an opportunity to produce him. We will have that proved by witnesses. I don't depend on this witness to show where he went down. I only depend on him to show he did go down and what he did when he did go down.

Q. Mr. Hagner, in questioning you, said, You don't remember how far they measured out when you went down on the 4th of January? Is that correct?

875 A. I didn't pay any attention to the measuring.

Q. To none of the measuring?

A. It didn't concern me.

Q. You went down, then, on the 4th of Jan. this last time, didn't you?

A. Yes, sir.

Q. And you went down some distance—ten or fifteen or some feet?

Mr. HAGNER: I object to the counsel interpolating where he went down, as Mr. Wilson did not know the positions and distances, and I have an engineer who will testify to that, and I object to Mr. Wilson stating he went down about fifteen feet.

A. I don't know anything about that.

Mr. WILSON: I object to Mr. Hagner's statement.

Q. I ask you did you go down on the 4th of Jan. ten or fifteen feet or more from the place you did go down in Nov. a year ago.

A. I am only guessing at that. I don't know about answering those questions.

Q. You must answer them to the best of your recollection.

A. It is only guessing. I didn't pay much attention.

Q. You didn't go down on the 4th of January last at the same place you went down in November a year ago?

A. No.

Q. As nearly as you can recollect, state how far was the place at which you went down in the river on the 4th of January last from the place you went down the previous time, in November a year ago.

A. First, I said before I went down on a lighter on that occasion and on a ladder on the other occasion; how far it would be  
876 on a straight line from the ladder I don't know, and then going down that way it would be twenty feet or something in that neighborhood.

Q. Mr. Hagner asked you did you find any part of that rock there when you went down on the 4th of January and you stated yes. What rock did you refer to?

A. The same rock; this same rock I found in January was about thirty feet long and between three and four feet high.



Q. You mean to say the rock you found the first time six or eight feet from the foot of the ladder was the same rock you found on the 4th of January when you went down then; do you mean that?

A. Yes, sir.

Q. How do you know it was the same rock?

A. By the feel of it.

Q. How did it feel?

A. The base of it felt it was a rock and it felt just the same as a rock.

Q. What did you have on your hands?

A. I had mits.

Q. What did you have the first time you went down?

A. Bare hands.

Q. Bare hands?

A. Yes, sir.

Q. On the second occasion you had mits and felt it with mits?

A. The second time; yes.

Q. With mits?

A. Yes.

Q. Did you make any signal the second time when you found the rock?

A. No, sir.

Q. You didn't make any signal?

A. It only belonged to our way of answering each other.

877 Q. How is that; blowing away bubbles?

A. Not quite. We didn't answer that way.

Q. You don't know from any measurements when you found the rock the second time, on the fourth of January, how far that rock was from the shore, do you?

A. No, sir.

Q. You don't know?

A. I might have made a statement how far it was, but it was only guessing. I don't know. I might have been asked to just guess at it, you know.

Q. Mr. Hagner asked you if the rock was in the same condition it was in before and you said no, and then he asked you what condition you found it in on the 4th day of January, and then he asked you what condition you found it in on the fourth day of January and you said you found a rock about three feet or about three and a half feet high. Is that it?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. On the first time you found a rock in the same place?

A. Yes, sir; in the same place.

Q. Five or six feet high?

A. Yes, sir; I judged so at that time. I tried to answer it in an honest way. The bottom is not what we call a good formed bottom, and the way I had of measuring the rock was to lay on it, and I judged from what I took up that it was between five and six feet,

standing by the rock. I may have sank down maybe a foot and a half in the mire below the surface at the time.

Q. Excepting from the feel of the rock, you had no means of knowing whether it was the same rock or not?

A. No, sir.

878 Q. By the measurements that didn't give you any information at all?

A. I corresponded with the same measurements this last time as I did before and found out it corresponded.

Q. How did it correspond?

A. We have a way of measuring with our hands—that is, the length of the rock—and after going over it I had about six of my lengths, and I thought I was correct in answering between twenty-five and thirty feet.

Q. The rock, in reference to its position from the wharf, you have no means of knowing that at all?

A. No, sir.

Q. It is only what you feel?

A. Only when I went down first; we went down off the ladder, and after we left the ladder I put my hand on the rock, and naturally I followed it, and I found it led out, and about middle way it turned towards the bridge, making the shape of a half moon; something in that shape.

Q. It was in the shape of a half moon?

A. Yes, sir; something; it was not exactly straight at the outer end towards the bridge, and then about three feet of it had been taken off. The last time I was down there I noticed the rock was not in the same shape as formerly; it was bursted in several places, it seems to me, the last time.

Q. You stated it was tampered with.

A. That is the expression.

Q. What do you mean by tampered with?

A. What I mean — it did not feel to me on the last occasion as it did at first.

Q. How did it feel then?

A. Of course no rock is smooth, you know, but it had no  
879 caps on it; had not been spalded in any way, only on top.

Q. Where the piece had been broken off?

A. Yes, sir; in a V shape.

Q. You exhibited a model here before that you had made, didn't you?

A. Yes, sir.

Q. And it is before you now?

A. Yes, sir.

Q. And you call that a smooth top?

A. Well, no; that ain't smooth.

Q. You say this rock you found, where at first it was a smooth rock, is now broken?

A. Yes, sir.

Q. Indicate on that where it was smooth when you first saw it.

A. There was no place where it was smooth, but it felt the same all over.

Q. Now, you say it is rough and broken. Indicate on that where it is rough.

A. All this top edge, say from about here to here, has been spalded (indicating on the top of the rock), broken.

Q. Then it was smooth, was it?

A. Yes, sir.

Q. Mr. Hagner asked you if it had been exploded and you said it seemed that way to you; what do you mean?

A. I would not like to say exploded, because I don't just like that way of expressing myself. It seemed just like it was the only word I could find at the time. It was the word Mr. Hagner suggested.

Q. Mr. Hagner suggested it first?

A. Yes, sir.

Q. Well?

A. I said it was exploded.

880 Q. What do you mean by that?

A. The reason I say it was exploded was because it felt like it was broken. It was broken by some means or other.

Q. With what?

A. I could not say.

Q. You could not say?

A. Unknown to me.

Q. Indicate on that rock how far it was broken.

A. I judge from here to here (indicating on the top).

Q. A distance of how many feet?

A. Eighteen or twenty feet.

Q. Do you mean to have it understood that you thought the whole top of it had been broken off?

A. Yes, sir; the whole top was broken—spalded.

Q. The whole top?

A. The whole top.

Q. Any mud on it?

A. I didn't go over on the back part. This is what I call the back part, when I come around here. When I got up on the rock I found it was all full of broken rock of all description, which was not there at the first time, and I thought it was unnecessary to examine that back part. (The back part is the part furthest from the wharf and east.)

Q. Did you see any holes in it as though it was blasted?

A. I felt one. It was on this corner (indicating).

Q. Describe that.

A. It was ragged. There was a hole in it; a raggety hole, as if it had been broken in some shape or other.

Q. As though it was drilled and powder put in it?

A. I don't understand about that.

Q. As though it was blown off by powder?

A. It looked that way; it felt that way.

Q. You could not see anything; you could not see a thing?

881 A. Nothing worth talking about. Seven-eight-s of the time we depend on feeling.

Q. What did you depend on this time?

A. By feeling.

Q. Can you describe that hole a little more distinctly?

A. I didn't pay much attention to it. It was a hole you could put in a quarter of a peck measure, I should judge.

Q. How deep was it?

A. Well, I didn't pay much attention. It might have been six or eight inches deep.

Q. Whereabouts was that hole?

A. That was about eight or ten feet from the outer end.

Q. Which end?

A. From the end furthest from the wharf.

Q. Can you mark that?

A. The outer end was here (indicating the west end)—that is, if the Aqueduct bridge is west.

Mr. HAGNER: The Aqueduct bridge is west of Mr. Smith's stone yard.

Mr. WILSON: I object to his interrupting the witness by telling him whether he is right or wrong as highly improper, in my judgment.

Q. Did you find the comb of it as the highest point of the rock? Did you find the comb, which is there (indicating on the model), as the highest point of the rock?

A. What do you mean by the comb? On this last occasion?

Q. Yes; the other day.

A. No; I didn't find no comb.

Q. You didn't find any comb?

A. No.

Q. Was there a comb there before?

882 A. Well, what I call a comb was this part here (indicating).

Q. The ridge?

A. Yes, sir.

Q. The sharp ridge?

A. Well, it was about four inches—four or five inches—on the top.

Q. And that was gone this time?

A. Yes, sir; the majority of it.

Q. The greater part of it?

A. Yes, sir.

Q. For the whole length?

A. No, sir.

Q. Ten or fifteen feet.

A. I said it was from here to here (indicating).

Q. How did it leave the top? Did it leave it smooth?

A. No, sir.

Q. It is not smooth now?

A. No, sir.

Q. How is it?

A. It is rough and in some place it is holes. In some places it is a little deeper than others. It has not got this combing on it.

Q. What has it got?

A. It is more flat than what it was the first time.

Q. You mean to say it is flatter now than the first time?

A. Yes, sir.

Q. How far is it at the end across the top?

A. I didn't measure that this last time.

Q. You have no idea?

A. I measured the first time and I judge it was about eighteen or twenty feet.

Q. What was?

883 A. Wide; that rock; yes, sir.

Q. At the highest point of the rock, as it is there now, how high is it above the bottom?

A. Between three and four feet.

Q. How do you know?

A. I measured it.

Q. How did *now* measure it?

A. With my hands.

Q. Describe how you measured it.

A. I was kneeling by it, and I know from where my knees was raising up against the rock from where it was at the top; I judged it to be between three and four feet.

Q. What did you find on the bottom at the place you measured?

A. Well, there was—it appeared to me to be a substance—dust; some hard substance. It was not mud and it was not sand. It was not exactly a formed bottom.

Q. Any stones there?

A. Well, in front of the rock there was a few—that is, small stones.

Q. What kind?

A. It was rock, I judge.

Q. Did you pick *any* up?

A. No, sir.

Q. Did you handle any or see any?

A. I didn't do *in* intentionally. I may have put my hand on it; I don't remember having any up.

Q. What were you sent there for?

A. To examine that rock; to see whether it was a solid rock, one rock, and to measure the length, width, and breadth on the first occasion.

Q. And on the second occasion?

A. On the second occasion I was sent there to examine the rock again with the same instructions.

884 Q. Were you informed it was suspected that the rock had been tampered with?

A. Not as I remember.

Q. What did you hear about it?

A. I didn't hear any one say personally that, but down upon the wharf I may have heard some men speaking about it—that something was the matter with the rock—and the idea came to me that

there was something. I didn't see why they wanted me to go on the same errand twice.

Q. Who did you hear speak about it?

A. No one personally. I disremember who I heard it from.

Q. When did you hear it; do you know?

A. I heard it in the morning before I went down.

Q. Where?

A. Down upon the dock.

Q. Who was there?

A. Well, there was right smart of men I don't know personally—that is, I didn't know the names of the men; I didn't see them before.

Q. State who you did know.

A. Mr. Broom and Mr. Olson and Mr. Hagner. There was another gentleman there; I don't remember his name.

Q. What time of day was it you went down?

A. I judge it was between twelve and one o'clock.

Q. In the daytime?

A. Yes, sir; maybe a little before twelve or a little after twelve; I disremember; I paid very little attention to that.

Q. You were examined here when, the last time; do you remember?

A. No, sir.

Q. No idea?

A. It was the first of the new year.

885 Q. On the 4th of Jan'y what part in the examination did Mr. Hagner take?

A. In examining the rock?

Q. In sending you down?

A. None as I know of.

Q. Did he do any of the measurements?

A. No, sir; that is, he gave me a pole to put it on the bottom.

Q. In January?

A. In January.

Q. He gave you a pole?

A. Yes, sir; he sent down a pole.

Q. How were the measurements made as to the distance of the hole—

Mr. HAGNER: I object to that on the ground that it was all gone into before, and it is repetition and simply consuming time, and I will have here a gentleman, as I said before, an engineer by profession, who made the measurements, who will testify about that.

Q. What occurred on the fourth of January, when you went down there, and what part did Mr. Hagner have in the measurements or examination?

A. I didn't pay but very little attention. I saw him with a rod, and saw him and another gentleman. I had an idea what they were doing, but what their figures were or what they were trying to do I don't know. I don't know how far it was or nothing like that. I never paid any attention to it.

## Redirect examination.

By Mr. HAGNER :

886 Q. Mr. Pierson, when you speak of the comb of a rock, what does it mean ; what is it like ? Does it look like a comb a person uses for the hair or the comb a chicken cock has on its head, or what does it mean ? What does it mean ; what is your idea about the meaning of a comb ?

Mr. WILSON : I object to that as incompetent and leading.

A. That is what I always called a comb.

Q. The upper part ; the crest of the rock ?

A. Yes, sir.

Mr. WILSON : That is objected to as leading and incompetent and putting words into the witness's mouth.

A. I would have thought of that myself. It is something on that plan. It is anything sharp and got a body to it and a ridge.

Q. By the comb you mean the top ?

Mr. WILSON : Objected to as incompetent and leading.

A. If Mr. Hagner had let me alone I would have answered that as a ridge.

By consent of counsel, the examiner is authorized to sign this deposition for the witness.

CHARLES J. PIERSON,  
By RUTLEDGE WILLSON, *Sp'c'l Com.*

887 And the witness ALBERT M. OLSON, who was presented for cross-examination by Mr. Wilson :

Q. You are a diver by profession ?

A. I have worked at it.

Q. How long ?

A. Two years.

Q. Were you down a good many times ?

A. Well, yes.

Q. How many ?

A. I could not count how many times I have been down.

Q. Who are you working for now ?

A. Mr. Broom.

Q. In Baltimore ?

A. Yes, sir.

Q. How long have you been working for him ?

A. About two years.

Q. Had you been working at diving before that ?

A. No, sir.

Q. Have you been during all that time a diver ?

A. No, sir ; diving and wrecking. Sometimes we have diving and wrecking together.

Q. You went over to Georgetown and went down into the water the other day, and made an examination the other day ?



A. Yes, sir.

Q. You can examine this plat, which is marked "Exhibit No. 7," and state where it was with reference to the wharf where you went down in the water.

A. There was no wharf there when I went down.

Q. You went down opposite the wharf, didn't you?

A. Yes, sir.

888 Q. Indicate the place on the wharf on this map opposite the place where the hole was cut in the ice.

A. I don't know; I ain't much on plans. (Drawing explained by Mr. Hagner.)

Mr. HAGNER: You can note an objection to this. It has already been testified by Mr. Broom where he went down. There is no question about that.

A. I don't know nothing about plans or draftings. I ain't no draftsman.

Q. Do you mean to say, considering the points that are marked here—the wharf and the elevator—you cannot tell where the hole was cut in the ice?

A. I cannot tell.

Q. Can you read?

A. Well, a little.

Q. Can you state where the elevator is marked on that plan?

Mr. HAGNER (to witness): The word "elevator."

A. Yes, sir; I find the word elevator, the name of it.

Q. That marks where the elevator is. Knowing that, can you state where the hole was in the ice? Can you tell there where the wharf line is from examining that plat?

A. Here is some piles. The wharf must be somewhere about here (indicating).

Q. In reference to this wharf and piles and elevator, can you state where the hole was cut in the ice?

A. I have not light enough to mark that.

889 Mr. HAGNER (explaining to witness): This is land here, and this is the water out here; here is the elevator, and the river is out here.

A. I don't know.

Q. Fix your eye on the place where the elevator is marked and the wharf line is marked and tell where the hole in the ice was cut.

A. I judge in this direction out here (indicating).

Q. How far?

A. That I don't know. I didn't measure that.

Q. Have you any idea?

A. Mr. Hagner took the measurements.

Q. You have no idea whether it was a hundred feet?

A. I don't know; I don't suppose it was a hundred feet.

Q. How much was it—fifty feet?

A. Fifty feet? I don't know as it was.

Q. I want you to take a pencil and mark on that map, to the best of your ability, where that hole in the ice was cut.

Mr. HAGNER: I object to the question on the ground that this witness has not been asked where he went down or to give any measurements, and it is not a proper subject of cross-examination at all. The witnesses who testified where they went down, one of them is Mr. Broom, and I shall have another witness to testify where they went down and where they made the measurements. This man says he did not make any measurements.

Q. In reference to the elevator, state where it was the hole was cut in the ice.

A. I will tell you I would not like to do it, because I was dressing while they were cutting the hole there and I didn't take much notice of it; in fact, it was cold and I kept my back to the  
890 wind. There was a hole cut in the ice when I was ready to go down.

— What was the size of the hole?

A. It was big enough for me to go down.

Q. Who cut it?

A. I don't know who did it, but Mr. Hagner was there himself attending to having it done.

Q. Was he there when you went down?

A. Yes, sir; on the ice.

Q. How did you get down into the water?

A. From a ladder.

Q. How deep was the water there?

A. I don't know, sir.

Q. No idea?

A. No, sir.

Q. Five feet?

A. I could not tell.

Q. You could not tell?

A. I never measured.

Q. You have no idea of the depth of the water at the place where you went down?

A. No, sir.

Q. How much pay a day did you get?

A. Well, we got a dollar an hour.

Q. What did you get?

A. That is what I am getting.

Q. How much did you get for this job?

A. I don't know.

Q. Haven't been paid yet?

A. No, sir.

Q. Have you been promised pay?

A. No, sir.

891 Q. How did you come to make the examination?

A. Mr. Broom; I have been working for him, and he does all the paying that is to be done.

Q. He does all the paying, and you look for your pay to him?

A. Yes, sir.

Q. How did you happen to come over to Washington?

A. Mr. Broom.

Q. He brought you over?

A. Yes, sir.

Q. How long did you stay here?

A. I staid till 5.35 last night. We took the train.

Q. From the fourth of January?

A. No, sir; from yesterday morning.

Q. What was the date on which you made this examination?

A. That was yesterday.

Q. Well, you made the examination yesterday and you testified yesterday, and after you got through you went home?

A. Exactly.

Q. Is that the pay—a dollar an hour—that skillful divers get?

A. That is what we get around Baltimore. In other cities I haven't been there.

Q. You haven't been employed by anybody except by Mr. Broom?

A. That is all.

Q. How many divers has he in his employment?

A. Well, there is two men working for him.

Q. Two besides yourself?

A. No, sir; he does his own diving if there is no one else around.

Q. When you got down into the water and got down to the foot of the ladder what did you do?

892 A. I went down there and saw if I could find the rock.

Q. Did you know there was a rock there?

A. That is what I went down to find out.

Q. Did anybody tell you there was a rock there?

A. Yes, sir.

Q. Who?

A. The people I was with.

Q. Who?

A. Mr. Broom, Mr. Pierson, and several others.

Q. When you got down there at the foot of the ladder what did you find?

A. I found the bottom.

Q. What kind of a bottom was it?

A. It was not very soft or very hard. I walked on it without going in.

Q. How were you dressed—have on clothes?

A. Yes, sir.

Q. What direction, then, did you walk away from the ladder?

A. I walked towards the outer side of the river.

Q. Towards Virginia?

A. I don't know what it was.

Q. How do you know you walked out?

A. From the way the ladder was.

Q. You walked away from the ladder?

A. Yes, sir.

Q. Could you see?

A. No, sir.

Q. How far did you go away from the ladder?

- A. I didn't go far.
- Q. How far could you go away from the ladder?
- A. I don't know.
- 893 Q. Did you have a line; how long was the line?
- A. I didn't have any line.
- Q. How did you get the air?
- A. I walked.
- Q. How did you get the air to breathe?
- A. By a pump.
- Q. Where was the pump, on the ice?
- A. In a boat.
- Q. Where was the boat?
- A. On the ice.
- Q. What kind of a boat was it?
- A. It was a flat-bottomed boat.
- Q. Was it fastened on the ice?
- A. No, sir.
- Q. How did it get there?
- A. They pulled it on the ice.
- Q. Was it a big boat?
- A. Yes, sir; right big.
- Q. How big?
- A. It looked to me about eighteen or twenty feet, probably.
- Q. Long?
- A. Yes, sir.
- Q. Did you pull that out from the wharf?
- A. No, sir.
- Q. How did you get it there?
- A. There were five or six hauling it there.
- Q. Five or six pulled it out to this hole?
- A. Yes, sir.
- Q. Was there any line fixed to your diving suit?
- A. Yes, sir.
- Q. How long was that?
- 894 A. I never measured it.
- Q. You have no idea?
- A. I guess it was probably about forty or fifty feet.
- Q. That was still out so you could use it and walk around with it?
- A. Yes, sir.
- Q. Could you move around with it?
- A. Yes, sir; it was attached to me.
- Q. When you got down to the bottom of the ladder how far did you go away from the ladder?
- A. I judge about three or four feet; between three and four feet.
- Q. Between three and four feet?
- A. Yes, sir.
- Q. Was the ladder straight up and down?
- A. No, sir.
- Q. How much did it slant?
- A. I don't know.

Q. Can you give us any idea?

A. No, sir.

Q. You cannot give us any idea how long the ladder was?

A. No, sir; I never measured it.

Q. You cannot give any idea?

A. No, sir.

Q. Whether it was five feet or twenty-five feet?

A. I guess it was more than five feet.

Q. Was it twenty-five feet?

A. I could not tell that.

Q. What did you find when you left the bottom of the ladder and commenced to walk away from it?

A. I said I walked about three feet or more.

Q. And then what did you find?

895 A. I made a little turn.

Q. You made a turn?

A. And hit my foot against something hard, and I stooped down and crawled down, and how far I crawled I didn't take much notice, but I kept feeling with my hand and found there was a rock there.

Q. There was a rock there?

A. Yes, sir.

Q. A flat-topped rock?

A. I didn't find it.

Q. What did you find?

A. I had not come to it then.

Q. What?

A. The flat top.

Q. You were asked by Mr. Hagner when you went down, what did you find, and you said you found a rock; is that correct?

A. Yes, sir.

Q. He asked you what was the shape of the rock, was it round or flat, and then you said it was kind of flat like on top; is that right?

A. Yes, sir.

Q. That is correct.

A. Yes, sir.

Q. How much of that rock was flat?

A. I don't know exactly. I didn't measure it. I went right over it. It might be twelve feet or maybe more.

Q. On top it was flat?

A. Not flat, but rough; clefty like.

Q. What was the top of the rock, the whole space?

A. Well, it was clefty like, sharp edges, and then it would go down and then come up again, and hollows like.

Q. Can you draw any?

896 A. No, sir.

Q. You cannot draw at all?

A. No, sir.

Q. Can you take a pencil and give us any idea of the top of that rock?

A. No; I don't think I could.

Q. Was the rock anything like the thing there shown you, Mr. Pierson has been talking about?

A. It was not anything like that; the rock was, but not on top.

Q. Describe how it was on top.

A. It was flat here (indicating on the top of the rock) and clefts in it.

Q. What part of the rock which is described before you? Where was it you first felt it when you left the ladder?

A. I judge it was about here, I think.

Q. That is the part nearest the wharf, is that so?

A. The way the ladder was it was out here.

Q. That is, the outside of the rock?

A. Yes, sir.

Q. So that the greater part of the rock was between you and the wharf, where you were?

A. Yes, sir.

Q. Did you go behind the ladder?

A. Well, I went down in front of the ladder and by the time I walked around and came back again I came behind the ladder.

Q. Did you find the rock when you were moving across towards the shore moving out from the ladder?

Mr. HAGNER: He has already said so.

Q. You found the rock moving out from the ladder?

897 A. Yes, sir; moving from the ladder.

Q. And the rock was between you and the ladder?

A. I think it must have been.

Q. You were asked by Mr. Hagner what sort of a bottom it was and you said it was muddy kind of a bottom, like old straws and things mixed up there; old manure like. Did you see any straws?

A. Yes, sir.

Q. You saw some straws?

A. I thought they were straws from the looks of them.

Q. How much ice was there on the surface of the water?

A. I didn't measure.

Q. Have you any idea; was it a foot thick or six inches?

A. I think I heard somebody say who measured it that it was eight or ten inches.

Q. Do you mean to say you could see something at the bottom of the ladder?

A. Yes, sir.

Q. You could see?

A. Yes, sir.

Q. What did you see?

A. As I said before I took up and handled what I thought was straw and held it up.

Q. So you could not be mistaken about it that it was straw?

A. It looked to me like it was old shavings or something.

Q. Was there any current in the river when you went down?

A. I didn't pay any attention whether there was or no.

Q. Would you not be apt to know?

A. If there was much current I would be very apt to.

Q. Did you measure the height of the rock?

A. Yes, sir.

Q. What is the height of it?

898 A. As near as I can come to it it was between three and four feet; it might be three and a half.

Q. Was Mr. Pierson there at the time you went down?

A. Yes, sir.

Q. The man that has been examined here today?

A. Yes, sir.

Q. Where were you when you measured it?

A. On the bottom.

Q. Mark the place on the rock where you supposed you were when you measured it?

A. I judge I must have been somewhere about here (indicating on the outside of the model).

Q. This is here on the outside?

A. Yes, sir.

Q. Did you measure any other place?

A. No, sir; that is about the only place I measured.

Q. How did you measure it?

A. Well, I went up to it, and I was standing, and by the height of myself I judge it was about that.

Q. And that was on the outside of the rock?

A. Yes, sir; as far as I know.

Q. Towards the other shore?

A. Yes, sir.

Q. And when you went down measuring it, what did you do?

A. I walked along here and I picked up a stone.

Q. That is the stone you produced here the other day, was it not?

A. I believe it was; yes, sir.

Q. Mark on the model there the place where you picked up the stone?

A. I picked it up about here (indicating on the model).

Q. The west end of the rock?

899 A. Yes, sir.

Q. Do you mean to say that stone is a piece of that same rock?

A. No, sir.

Q. What do you mean to say about it?

A. I mean to say I picked it up in one of them clefts.

Q. And it was a stone you found there?

A. Yes, sir.

Q. And whether it belonged to that rock or not you don't know?

A. No, sir.

Q. I wish you would describe the clefts, what you call them, in the rock; how deep they were?

A. When I picked the stone up?

Q. Yes, sir.

A. I was just about heading that stone I picked up.



Q. What does that mean?

A. The stone was pretty near covered in the cleft. The stone was about as deep as the rock.

Q. What was it covered with?

A. Nothing.

Q. Just lying in the hole there?

A. Yes, sir.

Q. What did you do then?

A. I carried it along and went with it for a while, and after I felt that was the only thing they wanted me to do down there I came back and came up to the surface.

Q. How long were you down?

A. I judge it was 15 or 20 minutes.

Q. You brought the stone up with you?

A. Yes, sir.

Q. And after leaving the stone in what direction did you go?

A. I came along here, feeling my way.

900 Q. Feeling your way out?

A. Yes, sir.

Q. Still out towards the ladder?

A. Yes, sir; towards the ladder.

Q. How far was the rock from the ladder?

A. Well, I don't know. I never took any measurements of that.

Q. Can you give us any idea?

A. There might be several feet; it might be four or five feet and it might be less. You have to step in the water when you are moving yourself, and you are moving without sometimes knowing it, so I don't know as I could tell you.

Q. What did you do with the stone when you brought it up?

A. I think that Mr. Pierson took it away from me.

Q. Have you seen it since?

A. Yes, sir.

Q. Where?

A. In this office.

Q. Did you identify it?

A. Yes, sir.

Redirect examination.

By Mr. HAGNER:

Q. Mr. Olson, will you be kind enough to state what your nativity is. Where were you born?

A. I was born in Norway.

Q. You are a Norwegian?

A. That is what they say I am.

Q. What have you been doing all your life, before you started diving?

A. Before I started diving, I have been wharf-building.

Q. Wharf-building?

A. Yes, sir.

901 Q. And before that

A. Well, I have been a sailor.

Q. A sailor?

A. Well, I came very near being one.

Q. When did you begin sailing?

A. Since I was five years old.

Q. And you are 35?

A. If I live to see tomorrow I will be 35.

Q. Mr. Olson, when you went down into the water I think you said you went from the ladder straight out across the river in that direction?

A. Yes, sir.

Q. How many steps did you take before you struck that rock?

A. In fact, I didn't pay any attention; I don't know.

Q. You said in your examination on yesterday that you thought it was four to six feet.

Mr. WILSON:

A. I object to the counsel stating what his own witness said.

Q. You said yesterday that it was four—

Mr. WILSON: Note an objection to Mr. Hagner's stating what his own witness testified to yesterday.

Q. You found a rock five or six feet from the bottom of the ladder out towards the river, and then you went along the rock. Did you crawl over the rock?

A. I was reaching over the rock.

Q. You reached over the rock?

A. Yes, sir.

Q. Did you crawl over it or walk alongside of it and feel over it?

A. I walked along here (indicating) and felt it with my hands.

Q. You walked along the outriver part of the rock and  
902 came around this way (indicating)?

Mr. WILSON: I object to this as grossly leading.

A. Yes, sir.

Q. You say when you came back you went behind the ladder?

Mr. WILSON: I object to that as leading and incompetent.

A. Yes, sir.

Q. That was your statement?

A. Yes, sir.

Q. I ask you then—you say you started then coming around the outer end of the rock and you went around on the inner side of the ladder.

Mr. WILSON: I object to that, as the witness did not say any such thing, and I object to Mr. Hagner's stating what the witness said as grossly leading and incompetent.

Q. You said that when you came back the rock was between the ladder and wharf. Did you mean to say that the entire rock was between the ladder and the wharf or part of it was between the ladder and the wharf?

A. I began on the east end of it between the wharf and the ladder.

Q. The east end of it was between the wharf and the ladder?

A. Yes, sir.

Q. And when you came back you were behind the ladder?

A. Yes, sir.

Q. Did you go all over the top of the rock? You only went around?

A. Yes, sir.

Q. And felt over the top of the rock and felt around it?

A. Yes, sir.

Q. And you said that on the west end of the rock there was still some combing like this (indicating)?

903 A. Yes, sir; clefts.

Q. The other was flat and combing on the ends?

A. Yes, sir; clefts in it.

Q. Clefts in it?

A. Clefts in it.

Q. You mean splits—holes in it? By clefts you mean splits?

A. Yes, sir.

Q. How many splits did you find in it?

A. I didn't count them; there were several.

Q. There were a good number?

A. Yes, sir.

Re-recross-examination.

By Mr. WILSON:

Q. How far from the whole cut in the ice was the pump?

A. I don't know, sir.

Q. Can you give any idea?

A. I judge it might have been 20 or 25 feet; it might be more.

Q. To the hole?

A. To the hole; yes, sir.

Q. And how deep was the hole?

A. I don't know, sir.

Q. That you don't know?

A. No.

Q. Mr. Hagner has asked you about where the ladder was that you went down on?

A. Yes, sir.

Q. And then he asked you which way you went when you got down?

A. Yes, sir.

Q. And he asked you if you went clear around the rock?

904 A. Yes, sir.

Q. Do you know the length of the rock?

A. No, sir; not exactly.

Q. About?

A. It might be 30 feet or more.

Q. When you got to the west end of the rock you were 30 feet from the ladder?

A. Whether the ladder was here or there you know I don't know. It was on the outside.

Q. When you got to the west end of the rock how far were you from the ladder?

A. I could not tell you.

Q. Have you any idea?

A. No, sir.

Q. And Mr. Hagner said you went around on the outside of the rock?

A. I came around this way.

Q. And during this time were you dragging the line around there or did the line go over the top?

A. The line might have floated on top; I don't know.

Q. Did it?

A. I didn't take any notice of that.

Q. Do divers allow the line to run over the tops of rocks in the water?

A. Yes, sir.

Q. It would be a safe thing for you to go around this rock and drag the rope—it would be good diving—the proper thing for a diver to do?

A. I don't know as it was.

Q. Mr. Hagner says you went around the rock?

A. Yes, sir.

905 Q. How far towards the wharf did you go?

A. I don't know how far I went.

Q. How did you get back from the inside of the rock? How did you get back to the ladder?

A. I crawled my way all around.

Q. And this rock was 30 feet long this way and 30 feet this way—that would be 60 feet and 20 feet around here (indicating)?

A. Yes, sir.

Q. From the time you left the ladder till you got back to the ladder, how far did you travel and how much line did you pay out?

A. The line, of course, was not lying along the rock.

Q. It was rubbing along the rock.

A. The line must have been on the rock. They will let out no more than necessary, and I judge it must have been on the rock—on the top.

Q. Rubbing along the comb?

A. I could not tell you.

Q. The line was all over the rock, rubbing along it?

A. Yes, sir.

Q. On the jagged and sharp rocks, and you dragged the line along here (indicating)?

A. I don't know what I did.

Q. You don't know?

A. The line must have been on the rock.

Q. You were down on the bottom?

A. Yes, sir.

Q. And this was 6 feet?

A. No, sir.

Q. How much was it?

A. Three and a half or four feet.

Q. Did you measure it?

906 A. No; I measured the highest place that was there.

Q. And you didn't measure it again?

A. No, sir.

Q. And the line went down to the hole and rubbed along here and went square around the rock?

A. I guess it did.

Q. Did you go square around the neck?

A. I think I did.

Q. You think you did?

A. Yes, sir.

Q. And the rock was between the ladder and the wharf, was it, or was it not?

A. When I came out here the ladder was on this edge (indicating)

Q. Up on this edge—up the river?

A. On this side. I could not tell.

Q. Looking at this model here and understanding where the wharf is, take a pencil and mark where that ladder was.

A. (Witness taking pencil and marking.) I don't know. The hole might have been up here or out further, or it might have been sheered over. I could not tell you that.

Q. I ask you again to take that pencil and mark on there where the bottom of that ladder was.

A. I cannot do it, sir.

Re-redirect examination.

By Mr. HAGNER:

Q. Now, Mr. Olson, is it not a fact——

Mr. WILSON: I object to that as leading and incompetent.

Q. Mr. Olson, will you state where the hose that furnished you with air is on your armor?

A. It is on the back of my helmet.

907 Q. And you are how tall a man?

A. I believe I can tell to about an inch.

Q. How high?

A. I think I am five feet nine; something like that.

Q. And while you were standing on the bottom of the river how high was the hose that gave you air from the bottom of the river?

A. It might be between two and three feet.

Q. How far was your helmet from the bottom of the river while you were standing on the bottom?

A. Well, I guess the hose touched it here (indicating the back of his head). It might be four feet four or five.

Q. Four foot four inches above the bottom of the river?

A. Yes, sir.

Q. And if you walked around a rock three or three and a half feet high are you likely to get your hose tangled up in the rock?

A. No, sir.

Q. When the men attending you pays out rope to you how much does he pay out?

A. He pays out gradually as the man walks along.

Re-recross-examination.

By Mr. WILSON:

Q. Do I understand you to say you walked around that rock?

A. Yes, sir.

Q. You didn't get on your hands and knees?

A. No, sir.

Q. Walked?

A. Yes, sir.

Q. Did you walk over the rock?

A. No, sir.

Q. How did you go along on the rock?

908 A. This way (indicating feeling with his hands).

Q. With your hands?

A. I was feeling on the rock; I had my hands on it.

Q. How far can you reach with your hands?

A. I guess I can reach three feet or more, anyway.

Q. How wide was that rock in the widest part?

A. Well, that I didn't take much notice of.

Q. Can you give us any idea?

A. No, sir.

Q. You cannot tell us whether it was three feet or twenty feet?

A. No; the widest part I just probably—I don't exactly know. It might be ten or twelve feet; it might be more or less.

Q. How do you know?

A. That is only guessing that is about all.

Q. A mere guess?

A. Yes, sir.

Q. You didn't go on top of the rock?

A. No, sir.

Q. Anywhere?

A. No, sir.

Q. And you don't know how wide it is?

A. No, sir.

ALBERT M. OLSON,  
By RUTLEDGE WILLSON,  
*Sp'cl Com.*

909 LOUIS E. BROOM, a witness produced by libellants, was recalled for further examination by Mr. Hagner:

Q. Mr. Broom, just state how long the hose is for that air pump, will you?

A. It is a hundred feet.

Q. How long is the line you tie around the waist of your diver when he goes down?

A. We generally have it a hundred feet long.

Q. Was that hose long enough for a man going down from above to go around a rock such as he described?

A. Yes, sir; he only used about half.

Cross examination.

By Mr. WILSON:

Q. You were on hand when this diver went down?

A. Yes, sir.

Q. And you were on hand, too, on the 4th of January when Mr. Pierson went down?

A. Yes, sir.

Q. What had you to do with their going down?

A. I came here to see that the work was done satisfactorily.

Q. How did you happen to come?

A. I had no other work going on to attend to, so I came here to see that it was done properly.

Q. At whose request?

A. Mr. Hagner had me to come over to make the examination.

Q. Do you own the diving suits?

A. I have an interest in them; yes, sir. There is a sort of wrecking company there and I am manager of it—the Baltimore Wrecking Company.

910 Q. Did you see the hole made the other day in the ice?

A. I marked off the hole to be cut out.

Q. You marked it off?

A. I marked it off; yes, sir.

Q. At whose direction?

A. Mr. Hagner had the distance made from the wharf where he wanted us to go down, and I cut the hole in the mark.

Q. That is, Mr. Hagner told you where to cut the hole?

A. I marked the hole large enough for a man to go down in.

Q. Mark on this drawing, Libellants' Exhibit No. 7, where you cut that hole, in reference to the wharf line and the elevator.

A. That hole was cut near here. I don't know the scale; I don't know the distance.

Q. The position in reference to the elevator?

A. I know there was 41 feet measured from this elevator here; it was near here (indicating) the tape-line was placed, measuring 41 feet.

Q. Between the elevator and the pile?

A. It was right near the corner of the elevator where it is marked "elevator."

Q. How far, about?

A. Two or three feet I supposed it was.

Q. Then straight out?



A. I could not say whether it was square out from there. They guessed it to be square.

Q. The point opposite that is where I want to get at.

A. It was a point between the end of the elevator and the first pile.

Q. It was several feet from that end?

A. Three feet or six feet, I could not say.

Q. And Mr. Hagner measured that distance?

911 A. Yes, sir.

Q. He measured it and told you where to cut the hole?

A. Yes, sir; he called my attention and marked it 41 feet, and I cut the whole outside of that mark; cut it outside of that mark.

Q. What is the size of the hole?

A. About four feet square.

Q. That would be 45 feet from the wharf?

A. On the the side of the hole closest the wharf was 41 feet.

Q. And then did you put down the ladder?

A. Yes, sir.

Q. What was the length of the ladder?

A. I judge it was an 18-foot ladder; probably only 16.

Q. Where was the diver's pump?

A. Sitting in the boat, 20 or 30 feet from the hole.

Q. And the boat was on the ice?

A. Lying on the ice.

Q. And you say there was a hundred feet of line there at this time, the other day?

A. There was a hundred feet of hose. It was in two sections, and each section is 50 feet; and the line I don't exactly know the length of it. We had more lines there, and if that line did not run short we did not use the other.

Q. What I want to know is what the length of the line was between the diver and the pump, connecting the diver and the pump.

A. Between 25 feet from the pump to where the head of the ladder was.

Q. I ask you how much line, when the diver went down into the water, connected him with the pump.

A. The tender, you mean. The tender has hold of the line. The line does not go to the pump, but just comes up to the tender.

Q. I don't understand that. The tender is the man that  
912 holds the rope?

A. Yes, sir.

Q. The air comes from the air pump?

A. Yes, sir; there — a hose line attached to the diver.

Q. What was the length of the line that was attached to the diver?

A. Somewheres around 50 feet long.

Q. At this particular time?

A. Yes, sir.

Q. What is the length of the hose that connected the line with the pump?

A. The hose did not connect the line with the pump. The hose is connected to the pump and the diver, and the line is connected with the diver and the tender.

Q. What was the length of the hose connecting the diver with the pump?

A. A hundred feet.

Q. A hundred feet?

A. Yes, sir.

Q. And the hose was connected with the pump 20 or 30 feet from the hose?

A. Yes, sir.

Q. And the ladder was about 18 feet deep?

A. The ladder, I judge, was between 16 and 18 feet long.

Q. What kind of material was the hose made of?

A. It was rubber and canvas.

Q. Were you superintending his going down?

A. I helped to get him ready to go down.

Q. Where were you?

A. Right there on the ice.

Q. Right there on the ice at the hole?

A. Yes, sir.

913 Q. How much of the hose was actually payed out?

A. About 30 or 40 feet.

Re-redirect examination.

By Mr. HAGNER:

Q. 30 or 40 feet, you mean, besides the line that runs from the pump to the hole?

Mr. WILSON: I object to counsel stating what the witness meant.

A. I mean 30 or 40 feet of the hose went down below the ice.

Re-recross-examination.

By Mr. WILSON:

Q. All the hose was paid out except about 25 or 30 feet?

A. The balance of the hose was laying on the ice, to be used if needed.

Q. That is to say, the whole, a hundred feet, was connected with the pump?

A. Yes, sir; one continual piece.

Q. Who paid out the hose?

A. The man attending the diver.

Q. You didn't do it?

A. No, sir.

Q. How long was the diver down there?

A. 15 minutes.

Q. You were right at the top of the ladder—at the hole?

A. Not while he was down in the water.

Q. Where were you while he was down in the water?

A. At the pump.

Q. You were in the boat?

A. Yes, sir.

914 Q. You were 20 or 30 feet away from the hole?

A. Yes, sir.

Q. You do not know how much hose was paid out?

A. There are two pieces of hose; each piece is 50 feet long. There is a coupling in the middle, and I saw the coupling on the ice.

Q. So there was only about 50 feet out?

A. Not 50 feet; it was not 50 feet went under the ice.

Q. Who was present besides Mr. Hagner when the hole was cut?

A. Well, Mr. Hagner and the two men that came with me is all I was acquainted with.

Q. Anybody else there?

A. There was a dozen or more there.

Q. Looking on?

A. Yes, sir.

LOUIS E. BROOM.  
By RUTLEDGE WILLSON,  
*Sp'cl Com.*

915 JOHN HANKINS, a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Examined by Mr. HAGNER:

— Some of the witnesses for respondents in this case, particularly one sea captain, testified that there was a butt sprung some 30 feet ahead of the mainmast of the "Tobin" when he examined her, and he also testified that that butt might have caused a leak in the "Tobin," that butt being sprung. I want to ask you if in your former testimony you at any time said that the "Tobin" after she sank and sprung on that rock hard that the bow of the vessel afterwards came in contact with a rock at the bottom of the berth.

Mr. WILSON: I object to that as utterly incompetent and immaterial.

A. I stated that her bow went down till it brought up on the bottom.

Q. Was the bottom hard?

A. Yes, sir; of course; if it was not a hard bottom she would not have come up.

Q. In other words, it would have broken in half?

A. Yes, sir.

Q. So it was the hard bottom at the bow that prevented that happening, in your opinion?

A. Yes, sir.

Q. I want to ask you if that represents, in your judgment, the various positions of the "Tobin" during the periods at which she was loading (handing witness a paper).

A. I think that presents her very well. I don't know how the rock looks; I haven't examined the bottom.

Mr. HAGNER: I offer that paper in evidence to be marked Exhibit Hankins No. 1, Rebuttal (filed separately).

Mr. WILSON: I object to that as preposterous.

916 Q. It has been testified by one of the trimmers, who said that while he was under the cabin on bar he went under the cabin close to the keelson; that he found water there three or four inches deep, one foot wide, and five feet long, lying close to the keelson, and that he got his foot in it. Would that indicate that the "Tobin" was making any water?

A. No, sir; not when she was down by the stern.

Q. It is a fact that at that time the "Tobin" had had some 200 tons of stone in bar in her aft-hatch, was it not?

A. I don't know when this happened. I don't know when the evidence was put in.

Q. This witness says that before the "Tobin" had been shifted he was still trimming stone in the aft-hatch under the cabin, where you were and where your cabin was; that at that time he was still trimming the stone, putting it back under the cabin. I want to ask you whether at that time she was down by the stern.

A. She was by the stern and we were loading.

Q. I want to ask you if that would indicate she was leaking any?

A. No, sir; it would only take a few gallons of water to come out of the ceiling in order to have a man get his feet wet.

Q. Have you the diagram of this place?

A. Yes, sir.

Mr. HAGNER: I offer this in evidence, to be marked Exhibit Hankins No. 2, Rebuttal (filed separately).

Mr. WILSON: I object to it.

Q. What does that diagram show?

A. It is supposed to be a section of the "Ellen Tobin" about the mizzen-mast; at the stern under the cabin right where the pump comes down.

Q. Forward of the cabin?

A. Forward of the cabin.

917 Q. And on the left you show a pump?

A. Yes, sir.

Q. And you show that pump coming how many inches from the outside skin?

A. Three inches; that is where we always put them.

Q. Three inches from the outside skin of the vessel?

A. From the outside planking.

Q. Three inches from the bottom—the outside planking of the bottom?

A. Yes, sir; that leaves room enough for suction. If you put it on the bottom there would be no suction.

Q. So that a foot in depth of water next to the keelson in the stern of the vessel where this man describes would indicate no leaking in the "Tobin"?

A. It would not.

Mr. WILSON: That is objected to as leading and incompetent.

Q. Captain, Mr. Smith, at page 5 of the Record, says, "I told him I did not know just what the bottom was, but that I would advise him to make his soundings there and to find out from time to time just how the vessel was lying." Is that correct?

A. Not exactly.

Q. State what is correct. What did he tell you?

A. He told me he would like to make some soundings, and there was a pole there to breast off with and Mr. Speaker would help me, and if I breasted off so the stern was clear of small stone that might have fallen off the lighters, there would be nothing to hurt me.

Q. Where did he say to sound?

A. Around the vessel.

Q. He says at page 6, "I told him I would put two scows  
918 between the schooners and load with barrows, wheelbarrows."  
Did Mr. Smith tell you that?

A. No, sir.

Q. He never told you that?

A. No, sir.

Q. He says on page —, "How did you get at there being four hundred tons in the vessel?" And he answered, "That is what the captain says." Who told you there was four hundred tons of stone in the vessel?

A. Mr. Speaker.

Q. You had no way of judging how much was in her?

A. No, sir.

Q. You only went by what Mr. Speaker said?

A. Yes, sir.

Q. In answer to this question on page 43 of the Record, "Did you tell the captain in your conversation with him in Mr. Lee's store he would find a pole to breast off with at the wharf?" "A. No, sir." "Q. You didn't mention a pole to the captain at all?" "A. No, sir." "Q. You didn't tell the captain on that morning when you saw him in Mr. Lee's store that Mr. Speaker would give him a pole?" "A. I told him Mr. Speaker would give him anything he wanted and do anything he wanted. If he wanted a pole to shove him off or more than one scow he would give him that or give him two scows." Did he tell you that?

A. He didn't mention the scow. He told me there was a pole to breast off with, and that Mr. Speaker would help me.

Q. He didn't say anything about a scow?

A. No, sir.

Q. When was the first time you heard from anybody anything about wheelbarrows?

A. About the latter part of the loading.

919 Q. When was that?

A. Saturday afternoon, before we stopped loading.

Q. You never heard it before that?

A. No, sir.

Q. What was the thickness of the ribs of the "Ellen Tobin"?

A. One foot.

Q. All over?

A. All the floor timbers. The side of the bilge inside came up square to the top; one-foot-thick ribs.

Q. Mr. Speaker at page 83 says, "I never gave the captain any statement about the depth of the water." Is that correct?

A. No, sir.

Q. What is correct?

A. I asked him how much water there was on Thursday, and he told me it was dredged to 14 or 15 feet.

Q. Mr. Speaker at page 87 says, "We talked about getting another lighter to put in to lay over Sunday." What is the fact about that?

A. He didn't say anything about laying over Sunday. He said, "We will put in another lighter Monday morning before we go to work." I told him if he would leave the lighter so I could get it and if I could get it in before Monday morning I would try to do it, so we would not lose any time Monday morning before we went to work.

Q. Did you tell Mr. Speaker, as he testifies on page 90, that the vessel was making water?

A. No, sir.

Q. Did you ever tell anybody that?

A. No, sir.

Q. Is it a fact that she was?

A. No, sir.

Q. Mr. Speaker, at page 91 of the Record, says that you said, 920 "I want to haul on high water, and you have not told me what scow I shall use, and I pointed to him and I says, 'Here is a scow lying right ahead there. Take that scow lying right ahead of you, that is the most convenient;' and he said he wanted to haul on high water, and I told him to use that scow. So I went then, and, to have it all straight, I called some of the men, a number of them, back to take the iron chute down, and they laid it down on the schooner." Tell me if that is correct. Did you say you wanted to haul on high water?

A. No, sir.

Q. What did you say?

A. I don't remember. I told him I would put the scow in between that and Monday morning. If I did say anything it was he would haul on slack water.

Q. At page 92 Mr. Speaker says, "Well, Captain, I see the captain of the tugboat has got our pole all right up there. He said, 'Yes; we will be all right now.'" Is that correct?

A. No, sir.

Q. You did not say, "We will be all right now"?

A. No, sir.

Q. Did he call attention to any pole?

A. I didn't hear him.

Q. On page 93 of the Record the question was asked, "Did he say what use he was going to make of the pole?" A. Only what he and I talked together about using two poles the day before, that on

Monday, after we had taken the second scow out, we would use the poles and then let her come in as close as would admit the chute to discharge into the vessel." What was the object of having poles; to let her come in or to keep her out?

A. To keep her off, so the scow could come in and unload so they could haul it up to the crusher.

921 Q. Now, at page 95 he says, "At that time the scow of which you speak was just in front of the vessel." What was the width of the scow?

A. 20 feet.

Q. The question was asked Mr. Speaker, "Sunday morning was she in the same position in relation to the wharf that she was when you left her? A. No, sir; I thought her bow had come in closer to the scow forward." How is that, Captain?

A. I didn't think it came in any closer, but the scow would go in and out before and went in and out after she sunk, so I think she lay in the same position.

Q. Was there anything done with the vessel to move her out?

A. No, sir.

Q. Or move her in?

A. No, sir; after I left her Saturday afternoon until she sunk there was nothing done. There was nothing done from Saturday afternoon until she sunk—that is, towards moving her.

Q. You said, "I asked him Saturday afternoon; the captain asked him if she was on something." Did you ask him that?

A. Yes, sir.

Q. And what did he reply?

A. He said, No; she was on nothing. He says, There is water enough right under the middle of her, above the 4th piling, to float her when fully loaded on low tide.

Q. Captain, on page 102, Mr. Speaker says, "I told him that we had it dredged out and the men that dredged it reported 14 or 15 feet of water." I want to ask you if Mr. Speaker told you that the men that dredged it out reported that much.

A. He did not say that the man who dredged it out reported it, but he did say that it had been dredged out to between 14 and 15 feet.

922 Q. Here is a man, one of Mr. Smith's witnesses, William Barton, who says at page 112, "That the tugboat hauled her chock up to the wharf," speaking of the "Ellen Tobin." Is that correct?

A. No, sir.

Q. Where was she taken?

A. To the soap factory was where she was taken, and afterwards it was taken down with a line and a small boat and hauled her down.

Q. To Mr. Smith's wharf?

A. Yes, sir.

Q. From the soap factory?

A. Yes, sir.

Q. Another witness says, on page 142, "The captain says to me,



he says, 'I believe I am ebbing out a little,' and he says, 'I would not like to put any more forward; she is near about on a level keel now, and I would not like to get her in down by the head; that the vessel is making some water, and I don't want to get it away from the pumps.'" Is that correct?

A. No, sir; it is not.

Q. What did you say about a level keel?

A. I didn't say anything about a level keel. She was down by the head or forward.

Q. Did you say she was dipping too much by the head?

A. Yes, sir.

Q. You wanted to get an even keel?

A. Yes, sir.

Q. Did you say anything about fearing that the water would get away from the pumps, as stated on page 142?

A. No, sir; we have a pump right there forward. It was just as near to the pump as anywhere.

Q. Did you have a pump anywheres else?

A. We had one at the mizzen-mast and one in the middle.

923 Q. I observe that the drawing as given by Mr. Brewer, the surveyor, does not show the two forward pumps. There is no question about the three pumps?

A. No, sir; there is one under the forward hatch here, one just forward of the main hatch, and one just aft of the mizzen-mast.

Q. Captain, I want you to say where these soundings as spoken of at page 163 were made. A witness says, "The captain made the first sounding there, but only found 9 feet of water." Where was that sounding made?

A. I sounded on the inshore side of the vessel towards the dock, abreast of the lighter, to see where the bank was.

Q. Where were you?

A. Standing on the lighter.

Q. And sounded along the ends of the lighter?

A. Along the end of the lighter towards the dock.

Q. That was opposite the 3rd or 4th piling, was it not?

A. Abreast of our stern. I don't remember where the piling was.

Q. Between your stern and the wharf?

A. Yes, sir.

Q. A witness on page 164 says, in answer to the question, "Did you not tell the captain and mate of the schooner that if they breasted the schooner off so the bilge side, as you express it, did not hit below the 4th piling, there is nothing to hurt the schooner?" —. Is that correct?

A. He told me so. I don't know whether he told the mate so or not.

Q. I want to ask you whether the "Tobin" was leaking that day at all (counsel reading from page 175 to 177 of testimony for respondents).

A. No, sir.

924 Q. Captain, I want to ask you how many tons of water in addition to her load of stone already in there would sink the "Ellen Tobin."

Mr. WILSON: Note an objection to all these questions as incompetent and irrelevant.

A. I don't know; I could not exactly tell how many tons would sink her—that is, if we had 450 tons of stone in her, she would not sink with 600 tons in her.

Q. In other words, it would have taken 150 tons of water?

A. She could have taken 150 tons of water more, and she would not sink with 150 tons more in her.

Q. She would not be loaded any deeper?

A. She would be to her bearings.

Q. She would be to her bearings if she had 150 tons more, whether water or anything else?

A. Yes, sir.

Q. And then only gotten down to her bearings?

A. She would have been loaded then.

Q. And simply have a fair load; is that the idea?

A. Yes, sir.

Q. What was the idea of breasting off with a pole, anyway?

A. It was to allow the lighters to come in to bring stone in for the accommodation of Mr. Smith's business.

Q. It was to accommodate his business?

A. Yes, sir.

Cross-examination.

By Mr. WILSON:

Q. Who made those paintings and drawings that were offered in evidence here?

A. I made this one (indicating Exhibit Hankins No. 1).

Q. Who made the other?

925 A. I don't know anything about the one with the varied colors. A gentleman that was upstairs made that.

Q. You didn't make it?

A. No, sir.

Q. It was made in Mr. Hagner's office?

A. Yes, sir.

JOHN HANKINS,  
By RUTLEDGE WILLSON,  
*Sp'cl Com.*

926

SATURDAY, Feb. 9th, 1895—12 o'clock m.

Met pursuant to adjournment last noted.

Present: Same counsel.

Whereupon NORTH OVERTON MESSENGER, a witness produced on behalf of libelants, being duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER :

Q. State your age and occupation, Mr. Messenger.

A. I think I am about 29, or a little over.

Q. Where do you reside?

A. 1216 18th street.

Q. In Washington?

A. Yes, sir.

Q. What is your business?

A. Reporter on the Evening Star newspaper; correspondent.

Q. What, if anything, have you to do with getting up the tide-tables which are published in the "Evening Star"?

A. When I am in the city in the morning, I make up the forecast of the tides.

Q. For the day?

A. For today and tomorrow.

Q. Where do you get the forecasts?

A. I obtain them from the tide-tables for the Atlantic coast, etc., for the year 1895, published by the Coast and Geodetic Survey.

Q. Where is it published?

A. The book bears date Washington, D. C., 1893, and is printed at the Government Printing Office.

Q. It was published in 1893 and gives the tide-tables for 1895?

A. Apparently.

Q. And it is prepared two years before the tides actually occur?

927 A. I would judge so from the latter date on it; that is the only reason.

Q. In 1893 the forecast was given long prior to the particular tides mentioned here by Mr. Smith and quoted from the "Evening Star"?

A. I don't know about that. That is going back some distance.

Q. How long have you been with the "Evening Star"?

A. I have made up these tide-tables for a year.

Q. Who made it up before?

A. I don't know.

928 JOHN B. LORD, a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER :

Q. You are the John B. Lord who has already testified in this case?

A. Yes, sir.

Q. On page 316 of Mr. Smith's testimony he says this: Mr. Wilson asked these questions:

Q. "You have stated, I believe, the date when the 'Ellen Tobin' was towed away?"

A. November 23rd.

Q. Were you present on the wharf when she was towed away?

A. Yes, sir.

Q. What time was it?

A. 2 o'clock in the afternoon.

Q. Of what date?

A. November 23rd, 1893.

Q. Will you state, if you know of your own knowledge, how much water she drew at the time she was towed away?

A. She was 12 feet forward and 13 feet aft by marks."

Q. Is that correct, Mr. Lord?

A. I don't think it is.

Q. What is correct? When was she towed away?

A. I don't know how much water the "Ellen Tobin" draws, but we had all the water so near out of her that she would not draw but very little more water, but she would draw more water than before she was injured. The water that was in her I had drawn out with the pumps—that is, I did not take it all out, but  
929 the water that was left in her would not make her draw more than when she was light.

Q. Than her light marks?

A. Than her light marks.

Q. Do you remember, Mr. Lord, whether I was present there on the wharf?

A. I don't know as you were present when we went away with her. It may be that you remained there or not, but I think you were there about the time we were ready. I remember you taking off your beaver and hurrying in the air.

Q. Was she sitting low in the water or not when I was there?

A. I think she was pretty well out of the water when you came there.

Q. Do you remember my staying there some time?

A. I don't know how long you stayed and I don't remember how long you were there.

Q. She was high out of the water?

A. She was high out of the water.

Q. Mr. Lord, would it have been possible, if that rock was only 12 feet from the surface of the water, if the top of that rock at the bottom was only 12 feet from the surface of the water, would it have been possible for the "Ellen Tobin" to have gotten away from there, only drawing 13 feet?

Mr. BARNARD: Objected to as incompetent.

A. I don't know that I am incompetent to answer that question.

Q. You started this answer and answer all you know.

A. I am competent enough to know that if a boat is touching anything with the weight of her, she is not apt to get away; she is pretty well anchored. I have had some experience in that.

— If that rock was 12 feet below the surface of the water and the "Ellen Tobin" drawing 13 feet, she could not get away?

A. She could not get away. I know right smart about boats  
930 getting away.

Q. How far, Mr. Lord, if you know, is the navy yard from Georgetown?

A. By water I should take it to be from three and one-half to four miles.

Q. By land how far?

A. By land I guess, if I took the railroad, I should think from four to five miles—I reckon five miles.

Q. Do you know or do you remember what the charter or act of Congress calls for of the Washington-Georgetown railroad at sec. 153?

Mr. BARNARD: I object to that as leading and incompetent.

A. I don't know anything about it.

Q. Mr. Lord, are you or not familiar with the tides in front of Washington? Are you pretty familiar with that?

A. Yes, sir; I consider that I am.

Q. Where is your principal sand yard?

A. The Seventeenth Street wharf.

Q. Will you tell us now whether the wind has any effect on the tides about Washington?

A. According to what quarter it is in. If it is the northwest wind and blows very hard for several days I guess it is not hard for any one to judge what effect it would have on the tide.

Q. What effect?

A. I saw the regular tide this last blow we had—

Q. A few days ago?

A. I guess the tide fell off not less than five feet. Don't you think it did, Mr. Smith (addressing Mr. Charles G. Smith, Jr.)? You ought to know about the tides.

Q. Now, Mr. Lord, suppose you have a strong northwest wind blowing for some days, will or not the tide rise at all?

A. It backs the tide. The northwest wind backs the tide  
931 right out.

Q. Right out?

A. Yes, sir; down the river—that is, if it is a fair northwest wind.

Q. But if, on the other hand, there is a southeast wind what is the effect?

A. It blows the tide in. It blows the tide up.

Q. Makes it what?

A. A very high tide.

Q. So that a person can or not predict what the tide will be the coming week or the coming year, however mathematically correct he may be as to the probabilities?

Mr. BARNARD: I object to that.

Q. Can I predict what the tide will be tomorrow or next week?

Mr. BARNARD: I object to that as leading.

A. I will answer it in this way: Very often I have had boats

ashore and we expected that the tide would make up very full, but, on the other hand, it often occurred that what we call "nip" tide did not come and we did not get off.

Q. Although—

A. Although it was a regular tide. If it came a regular tide we would get off.

Q. Although the hour for the regular tide would arrive, it would not arrive?

A. As the watermen call it the "nip" tide, it would not come.

Q. Why?

A. The wind might not blow here, but would outside.

Q. Below in the river?

A. Below. I have often been at fault on those things. I am pretty well posted on tides.

932 Q. Now, a clipping from the Evening Star has been filed in this case prognosticating the tides for the following days. Can you say whether a prognostication of the tides at a certain time would probably be correct?

A. It might strike it the same as the Weather Bureau do and they might miss it.

Q. They might miss it?

A. Yes, sir; very often it misses it, because the winds strike up during the time and knocks the tides down. For instance, I will tell you one case: It was several years ago that the wind blowed most tremendous from the northwest for two or three days, and a scow of mine went across the Long bridge and across the flats to Four-mile run. It would drown us at a full tide at any other time if we went out, and we went out.

Q. Did the tide remain there for several days?

A. Yes, sir; I don't know as it did for several days, but this I know—it was the lowest tide I ever saw.

Q. And it was caused by what?

A. By the northwest winds.

Q. Do you remember what time in the year that was?

A. It was in the winter time. There was no ice on the river, but it was cold, we having to freeze where the water had left it. I was reconnoitering for sand, because it was a good time to get on the flats.

Q. Suppose you were given a tide to be a certain high at Giesboro or at the navy yard, could you tell it was going to be the same high at Georgetown at that particular time?

A. At the same time?

Q. At the same time.

A. The further up the longer it takes to be high; it is high tide down the river before it is up here.

933 Q. Do you know whether there is more than one tide in the Potomac at a time we may name? Suppose you start from here to Point Lookout, would you meet several tides?

A. No; I guess not; the tide ebbs and flows only twice in 24 hours.

Q. Suppose at 12 o'clock today the tide is high at the navy yard

and you go down 20 miles and you would not have it at that hight?

A. If the tide was high here when we started it would be ebb tide, and of course the tide has commenced to run out; it takes the tide 7 hours to run out and five to run up.

Q. Seven hours to run out and five to run up?

A. Yes, sir.

Q. And if you started from here with a tide at the neap—suppose you start here with the tide coming to its hight and you go down the river ahead of the ebb tide, the tide travels some few miles an hour—some two or three miles—

A. I don't know about that; I don't know how many miles it does travel now.

Q. About how many?

Mr. BARNARD: I object to that, as he says he does not know.

Q. You are not sure of that?

A. No, sir.

Q. If the tide was to travel out at 4 miles an hour, or say at 2 miles an hour—suppose the tide is traveling at 2 miles an hour and you have very nearly a high tide, and suppose you are on the high tide at the navy yard and you go down 4 miles, you would find high tide four miles down?

Mr. BARNARD: The question is objected to as incompetent and no part of the proper rebuttal testimony.

A. I say this: it is according to what I travel in; if I am in a steamer or fast-going boat and the tide going down 4 miles  
934 there won't be such difference, because we travel faster than the tide goes out.

Q. Suppose the tide is coming in and you go down 4 miles, you have a variation from what it is here?

A. We are always glad to get the tide coming up with us. The tide helps us.

Q. The tide helps you?

A. Yes, sir; if we have a heavy tow.

Q. Did you ever come from the mouth of the river on a vessel?

A. I never did.

Q. How far did you go down?

A. I went down 50 miles.

Q. Where is that?

A. I go down to Acquia creek.

Q. And Occoquan and Quantico?

A. Yes, sir.

Q. You are familiar with them?

A. I am pretty familiar with the river that far. I am not a waterman myself.

Q. You have your dredges down there?

A. Yes, sir. It is very seldom I go down.

Q. Your familiarity extends 50 miles down the river?

A. Yes, sir; I go down that far. I might steer a boat that far, but I would not want to go any further.



## Cross-examination.

By Mr. BARNARD:

Q. Mr. Lord, did you look at the marks on the "Ellen Tobin" the day she was towed out?

A. The day she was towed out?

Q. Yes.

935 A. I don't know as I did.

Q. You say you are pretty familiar with tides. What is the cause of tides?

A. The making of the tide—how high?

Q. What is the cause of tides?

A. I should say the natural—that is something I never studied; but it is a natural thing. Some places, I believe, they don't have any tide, but on the the Potomac river the tide ebbs and flows in 24 hours, and some three and a half to four feet, then.

Q. It does not always come the same time of day?

A. There is a variation of three-quarters of an hour a day.

Q. Has the moon anything to do with it?

A. The moon is said to rule the tides. The saying is, big moon, full tide; full moon, full tide.

Q. The tide can be calculated by the movements of the moon?

A. They generally calculate that the tide varies about the same time the moon does each night.

Q. But the exact height of the tide cannot be calculated, because the winds affect it?

A. The winds affect it; but on regular tides at regular weather and winds calm the tide comes tolerably regular.

Q. About the same height?

A. About the same height.

Q. The northwest winds keep the tides back and the northeast winds drives up the higher tides?

A. Yes, sir; I am speaking of the tides in the river here. I don't know any other tides but the river tides.

## Redirect examination.

By Mr. HAGNER:

Q. Mr. Lord, where were you when the "Ellen Tobin" was being pumped out?

936 A. I was right there on the boat.

Q. Do you remember how you pumped her out; how you had to put your pumps?

A. Yes, sir.

Q. How did you put them?

A. I placed two pumps on the "Ellen Tobin's" decks, close to one of her hatches, and then I taken my steam from the tugboat and attached to those two pumps from the steam in my tugboat, and then I placed my centrifugal pump, the pipes, from that down the other hatch.

Q. How far up were the arms of those pumps—the pipes of that pump; how far would they reach in the air?

Mr. BARNARD: This question and the previous one is objected to for the reason that this matter was gone into in the testimony-in-chief. It is no part of the rebuttal testimony.

Mr. HAGNER: The answer to that is this: It is not testimony-in-chief, but it is simply testimony in rebuttal to show that the "Ellen Tobin" was high up out of the water, so as to contradict Mr. Smith as to what he says her condition was on the occasion of her being taken off from the wharf.

Q. Now, Mr. Lord, can you state how high your pumps would continue to suck as put over? Were the pipes to the pump over the railing of the "Ellen Tobin"?

A. We cut the railing away.

Q. You cut the railing away?

A. Yes, sir.

Q. And you put your pumps through the bulwarks?

A. There were two pumps setting right on——

Q. On the what?

A. On the decks of the boat. As regards the centrifugal pumps, the length of pipe out of her I disremember, but the other I  
937 had right on her deck. I had a steam hose attached from my tugboat to the pumps so as to allow for the rise of the boat as she came up and nothing to hinder her from coming up.

Q. How high were they capable of allowing her to rise?

A. I think I had pieces of steam hose about 10 feet. I think the pieces of steam hose was not less than 10 feet.

Q. In height?

A. In length.

Q. And they were put perpendicular in order to get over the sides of the "Ellen Tobin"?

A. The pipe was run high above the pumps, and then it is attached to the steam—the steam hose attached to the iron pipe.

Q. How high was the discharge pipe, the pipe that let the water out? How high did that come up over, say, the deck of the "Tobin"?

A. We discharged from those pumps right over the "Ellen Tobin's" rail.

Q. Over the "Ellen Tobin's" rail.

A. And then the discharge from the centrifugal pump——

Q. Did you keep pumping the "Ellen Tobin" as long as those pumps would allow her to be pumped?

A. I think they pumped until they failed to suck, until the centrifugal pump refused to suck.

Q. Until the centrifugal pump failed to suck?

A. Yes, sir.

Q. How high could the centrifugal pump be up and still continue to pump?

A. I don't know.

Q. About?

A. I could not say.

Q. Do you remember?

A. I don't know; I don't remember; I don't know. If I  
938 charged my memory with it I might know.

Q. Were you on the "Ellen Tobin" all the time the pumping was being done, or standing on the lighter?

A. I think I was on the "Ellen Tobin."

Q. And watched her as she came up?

A. I watched the "Ellen Tobin," watching the man down in the  
"Ellen Tobin" stopping up the leaks as she raised around the well.

Q. As she arose around the well you would stop the leaks?

A. Yes, sir.

Q. The centerboard well?

A. Yes, sir.

Q. And as she came up you watched her?

A. Yes, sir.

Q. Did you say already, Mr. Lord, about the amount of water you think she was drawing when she came away from there?

A. I don't think she was drawing a very little over the water she would draw light. She drew more on account of some stone being in her; a few stone.

Q. Can you state about how much stone was in her when she went away from there?

A. There was not very much; you could see that in the ship yard. I didn't leave as much in her as my contract called for.

Q. It was not 6 inches from the bottom?

A. No; it was not 6 inches from the bottom.

Q. Can you approximate in tons about how many tons were left in her?

A. I don't know how many were in her. I don't think there was many tons left in her.

Q. Not many? How many—twenty or fifty or thirty or five?

Mr. BARNARD: I object to that, as it is evident the witness would only be guessing at it.

939 Q. I want simply as nearly as you could get at it.

A. I don't know about that. You can get that at the ship yard. They taken the stone out and they know about. I don't know anything about it.

By consent of counsel, the right to further cross-examine this witness is reserved if desired.

See page 187.

940 J. M. WALTER ATLEE, a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. State your full name.

A. J. M. Walter Atlee.

Q. What is your business?

A. Civil engineer.

Q. How are you now engaged?

A. I am chief engineer of the Washington, Alexandria and Mount Vernon railroad.

Q. Will you state where you were on the 4th day of January, about midday, on Friday, the 4th of January last?

A. I was at Georgetown.

Q. Do you know where the stone elevator and crusher and works of Mr. Smith are there?

A. I do.

Q. Do you know Charles G. Smith, Jr., when you see him?

A. Yes, sir.

Q. Is this the gentleman there (indicating Mr. Charles G. Smith, Jr.)?

A. Yes, sir.

Q. Did you see him there on that day?

A. I did.

Q. I want to ask you if you assisted in taking a measurement on that day near or on that wharf.

A. I do.

Q. What was the measurement? What did you measure with, to begin with?

A. We measured with a rod about fifteen and a half feet,  
941 an unpainted rod, and measured on a line.

Q. What line did you measure on?

A. We measured on a line from a notch in the edge of the wharf.

Q. At what point?

A. About 2 feet south—

Q. East?

A. South I call it.

Q. 2 feet from where?

A. From an upright. What do you call it?

Q. The elevator.

A. A part of the elevator.

Q. Was that two feet towards the Aqueduct bridge or towards Washington?

A. Towards Washington.

Q. Two feet towards Washington from that elevator or bin?

A. The bin or elevator; the bin; that is the word I wanted; towards Washington.

Q. It was from that point to what point?

A. Towards a forked tree on Analostan island.

Q. What kind of a looking tree was it?

A. A kind of a stump. It was a small tree.

Q. It was a small tree?

A. The tree was 20 feet high, I presume.

Q. It was a forked tree?

A. Yes, sir.

Q. Do you remember which way it forked?

A. The fork went towards the south.

Q. Upstream or downstream?

A. Downstream.

Q. How far out did you measure?

A. I measured out 36 feet.

942 Q. From that notch in the wharf?

A. From a vertical point under the notch.

Q. And on the line you have indicated, you say?

A. Yes, sir.

Q. To what?

A. To that tree; towards that tree.

Q. Did you see that the pole was in that line?

A. I gave the line; yes, sir.

Q. Did you see any one go down after that—a diver?

A. I did.

Q. You saw a diver go down?

A. Yes, sir.

Q. Did you see the pole put down through the ice at that distance?

A. Yes, sir.

Q. What was the diver to do; what was the bargain?

A. The diver was to raise it up and down three times.

Q. The diver was to raise it up and down three times?

A. Yes, sir.

Q. Was that done after he went down under the ice?

A. It was done when he went under the ice the second time.

Q. How many times did the diver go down, do you remember?

A. Three times, I think; twice, I know.

Q. He went down twice you know?

Mr. WILSON: Don't repeat the answer. I decidedly object. I object to Mr. Hagner's repeating the answer of the witness, and I insist that the witness shall answer the question, and Mr. Hagner shall not undertake to say what he said.

Mr. HAGNER: Mr. Hagner has a remark to say about this: That he repeated the answer that there may be no fear of the stenographer not getting the question and answer correct, and that is my custom whenever I can.

943 Cross-examination.

By Mr. WILSON:

Q. You are accustomed to drawing on the scale?

A. Yes, sir.

Q. Examine Complainant's Exhibit No. 7 and mark thereon from what point you measured on the 4th of January.

A. That point is the point there (the witness having examined drawing Exhibit No. 7 and marking it with the letter A).

Q. Mark the point where the stick was in the water.

A. It is supposed to be 36 feet from that point. How am I going to mark it without that point?

Q. Is it at right angles with the wharf?

A. I cannot recall the answer.

Q. The question is to mark as well as you can the point where the stick was put in.

A. It was about at that point. If it was there I would say there, too.

Q. Mark the point.

A. This angle might be something less than right angles, and it might be more than that. I don't know exactly, although I was there January the 4th.

Q. I ask you to mark on the map where this stick went into the water.

A. I don't know that I will mark anything.

Q. If you cannot do it, say you cannot do it.

A. Here is as near as I can do it (witness marking No. 7 A No.

1). That is about as close as I can do it.

Q. And that line indicates the direction the stick was in the water?

A. As near as I can now remember.

Q. Who determined where the stick should be stuck down?

944 A. I assisted measuring the distance. Mr. Hagner gave me the line.

Q. Mr. Hagner gave you the line. Did he tell you where to stick the stick down?

A. He told me to stick the stick down 36 feet.

Q. 36 feet?

A. Yes, sir.

Q. And you stuck it down where he told you?

A. That distance; yes, sir.

Q. And what happened then?

A. The first time the diver went down he did not reach the stick.

Q. When he went out from the wharf?

A. Yes, sir. He was there lower down or further up.

Q. And he did not get to the stick at all?

A. Not the first time.

Q. Why?

A. I don't know, sir. He had no signals to tell which way to go, and he simply missed it.

Q. Did the diver see the stick before he went down? Could he see where it was?

A. Yes, sir; he took his bearings.

Q. And when he got down he could not find it. Is that so?

A. He did not find it the first time.

Q. Did he come up again; and, if so, what did he do?

A. He came up again and took his bearing over again and went down and found the stick.

Q. How long was he down the second time?

A. Well, I was very cold and had wet feet, and I would not like to say. I think he was there a half an hour. It might be 10 minutes. That is all I know.

Q. Who was present when the diver went down?

945 A. Mr. Hagner and, I think, Mr. Smith.

Q. What were you there for?

A. As a witness; not as a witness in the trial, but to see what was going on.

Q. Were you there accident-ly?

A. I came here to the office accident-ly.

Q. And he invited you to go over?

A. Yes, sir.

Q. And after you got there he asked you to measure this distance?

A. Yes, sir.

Q. How did you measure it?

A. With a wooden rod?

Q. Marked?

A. The inches were not marked, but the feet were.

Q. What sort of a rod was it?

A. It was a wooden rod fifteen and one-half feet long, 2 inches wide, and 1 inch thick.

Q. Was it a graduated and marked measuring stick or just a common pole?

A. It was a measuring stick, but was not any standard stick.

Q. Were any inches marked on it?

A. No.

Q. Was every foot marked on it?

A. I didn't notice that. There were marks of feet on it, but I don't know that every foot was marked.

Q. How do you know it was 15 and 1-half feet long?

A. The same as I measure with this rule (witness exhibiting an ordinary 12-inch ruler).

Q. With your eye?

A. No, sir.

Q. Was it marked 15 and 1-half feet?

946 A. It was marked.

Q. Was it not just a plain stick and no marks on it at all?

A. No, sir.

Q. Where did you get it?

A. About the first time I saw it was in the wagon.

Q. The wagon you went over in?

A. Yes, sir.

Q. Mr. Hagner's wagon?

A. The one he hired.

Q. Who told you to measure with that stick?

A. Mr. Hagner.

Q. Did you make any memorandum of the measurement at that time?

A. I did.

Q. Have you got it with you?

A. I cannot find it.

Q. Were you there when another measurement was made after the 4th of January?

A. No, sir.

Q. You were not there when the diver went down the second time?

A. On the same day?



Q. Any other day?

A. On no other day.

Q. Did you know what these measurements were being made for?

A. I was told they were—I don't know that I was told what it was for until afterwards.

Q. All the information you have or which you were given you got from Mr. Hagner? The 36 feet did not mean anything to you; you had no reason to go out 36 feet and then have a stick stuck there?

A. No, sir.

Q. He asked you to go out?

947 A. He asked me to measure on that given line 36 feet.

Q. He fixed the point where you started from and fixed the direction to take?

A. He showed me a notch in the wharf.

Q. And he showed you the fork in the tree?

A. And he showed me the fork in the tree.

T. M. W. ATLEE,  
By RUTLEDGE WILLSON,  
*Sp'c'l Com.*

Whereupon an adjournment was taken, to meet on Wednesday, Feb. 20th, 1895, at 3 o'clock p. m., at the same place.

948 WEDNESDAY, Feb. 20th, 1895—3 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Same counsel, except Mr. Nathaniel Wilson.

Whereupon LOUIS HINES, a witness produced on behalf of libellants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. State your name, age, residence, and occupation.

A. My name is Louis Hines; I live at 3218 O St.; I am in the business of collecting just now.

Q. Mr. Hines, I want to ask you to state whether you were, on Monday evening, Feb. 18th, at or near the stone elevator or stone-crusher on the dock east of the foot of High street.

A. Yes, sir.

Q. What did you do there?

A. Well, I measured the hole that was in the ice—the distance the hole was from the wharf.

Q. Just state where you made the measurement and where the hole was. Did you make a memorandum of it?

A. Yes; the whole is five foot three inches parallel with the wharf.

Q. What is the size of the hole?

A. Five foot three inches east and west.

- Q. Running east and west five foot three inches?  
A. Yes, sir.  
Q. And running north and south how much is it?  
A. Four feet.  
Q. What direction is it from the east end of the elevator?  
A. The hole is in line with the east line of the elevator forty feet and four and a half inches from a mark two feet east of  
949 the post.  
Q. Of the elevator, is that?  
A. Yes, sir.  
Q. Subsequently to that did you make any measurement?  
A. Yes, sir.  
Q. What was that second measurement?  
A. From the wharf opposite the long chute, twenty-five feet and two inches.  
Q. Can you state from that measurement how far the foot of the chute is from the wharf?  
A. The foot of the long chute is 25 feet and 2 inches from the wharf.  
Q. Were there any other holes in the ice in that neighborhood?  
A. No, sir; no other holes.

Cross-examination.

By Mr. BARNARD:

- Q. Was there any hole in the ice on Monday in the river?  
A. Yes, sir.  
Q. How did it come there, do you know?  
A. I don't know.  
Q. What time on Monday was this you were there?  
A. Well, I should judge it was about 4 o'clock or thereabouts somewhere.  
Q. Was there no ice across this place you speak of?  
A. Yes, sir; it was very thin, though.  
Q. How thick?  
A. Well, I should judge about an eighth of an inch. I don't think it was half an inch.  
Q. Did you break it?  
A. Yes, sir.  
950 Q. How did you break it?  
A. I just dropped a small stone on it and it went through.  
Q. Then the hole you refer to is a place where there was thin ice, and not where there was an absolute hole?  
A. There was a hole there partly covered over with ice.  
Q. How did you make this measurement?  
A. I measured with a tapeline.  
Q. What kind of a tapeline?  
A. Steel.  
Q. Who helped you?  
A. Mr. Mankin, I think his name is; I am not sure.

Q. Did you have to move the tapeline while you were making the measurement or did the tapeline extend the whole distance?

A. It extended the whole distance.

Q. Which end of the tapeline were you at?

A. Mr. Mankin held the end of the tapeline and I took the measurement.

Q. How did you take it?

A. How do you mean by that question?

Q. You say you held the end of the tapeline. Did you walk out with the tapeline to the other end?

A. I walked with the tapeline to the other end.

Q. Where did Mr. Mankin hold the other end of the tapeline?

A. In which measurement?

Q. The one you are speaking of; the first measurement.

A. He held it on the west side of the hole.

Q. Well, then, you went towards the wharf with the tapeline—started from the hole?

A. No, sir.

Q. Where was Mr. Mankin when he held the tapeline?

A. He was standing on the edge of the hole, the west edge of the hole, and I was on the east.

951 Q. What I am trying to get at is the measurement from this hole to the wharf.

A. From the hole to the wharf.

Q. Where did you measure to then? Never mind the distance. Where was the tapeline put on the dock?

A. Two feet from the post on the east line of the elevator.

Q. Two feet from the post on the east line of the elevator?

A. Yes, sir.

Q. How far from the edge of the wharf?

A. It was right on the edge of the wharf.

Q. Right on the wharf?

A. Yes, sir.

Q. Which way; what direction did you go from the elevator this two feet?

A. East.

Q. Then, in what direction is the line between that point and where the hole was?

A. What direction was the line?

Q. Yes, sir.

A. South.

Q. How came you to go there to make these measurements?

A. I was standing in my office door and Mr. Mankin and this gentleman passed by, and I was asked to go down and make the measurements.

Q. Who asked you?

A. Mr. Mankin.

Q. Are you acquainted with Mr. Hagner?

A. This gentleman here?

Q. Yes.

A. No, sir; not before Monday.

Q. You are not an engineer, are you ?

952 A. Well, I worked at the business.

Q. Who did you work for ?

A. H. W. Brewer.

Q. H. W. Brewer ?

A. Yes, sir ; a very short while, however.

Q. Now, you made another measurement, you say, to this hole from some point. Where was that ?

A. North and south.

Q. What point on the shore did you measure that from ?

A. We measured from the edge of the hole to the other—from one edge to the other.

Q. You spoke about 25 feet. What is that ?

A. That is from the wharf to the end of the long chute.

Q. From the wharf to the end of the long chute ?

A. Yes, sir.

Q. At which end of the tapeline were you then ?

A. I was at the end of the long chute.

Q. Can you reach the long chute from the wharf ?

A. We were standing on a scow at the time.

Q. Did you touch the long chute—could you reach it ?

A. Yes, sir ; not exactly touch it, either, but I had a board and I got a direct, straight line.

Q. Then you measured from a point beneath the long chute, then ?

A. Yes, sir.

Q. The forty feet and four and a half inches goes to the near edge of the hole ?

A. Yes ; to the near edge of the hole.

Redirect examination.

By Mr. HAGNER :

Q. Were there any other chutes there ?

953 A. Well, not as long as this one.

Q. That was the longest ?

A. Yes, sir ; that is the longest.

Q. The H. W. Brewer you speak of, what is his business ?

A. Civil engineer.

Q. Civil engineer and surveyor ?

A. Yes, sir.

Q. Is he engaged over here in the District office for the surveyor of the District ?

A. I could not answer that question.

LOUIS HINES,  
By RUTLEDGE WILLSON, *Sp'c'l Com.*

And WILLIAM P. H. CREWS, a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. Mr. Crews, just state your business and place of residence.

A. I am a compositor in the Evening Star office.

Q. And your residence is what?

A. 1511 8th St. N. W., in this city.

Q. Mr. Crews, state if you had anything to do with the making up of the prognostications of the tides in the Evening Star during the year 1893?

A. I did not have the making up of them, but I had a copy of them from the hydrographic book.

954 Q. And the hydrographic book is made up when?

A. I don't know. I didn't pay any particular attention.

When each year runs out another is furnished to the office.

Q. In other words, the year the book is printed it is the prognostications for the following year?

A. Yes, sir.

Q. That was the case in 1893?

A. Yes, sir; that was the case in 1893. I had charge of them up until a few months ago. I had entire charge in 1893.

WM. P. H. CREWS,

By RUTLEDGE WILLSON, *Sp'cl Com.*

Whereupon an adjournment was taken, to meet on Wednesday, Feb. 27th, 1895, at 3 o'clock, at the same place.

955 WEDNESDAY, Feb. 27th, 1895—12 o'clock m.

Met, pursuant to agreement of counsel, before the time as set by adjournment last noted.

Present: Same parties except Mr. Wilson.

Whereupon JOHN A. CURTIS, a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. Give your residence and occupation, please, Mr. Curtis.

A. Residence, Richmond, Va.; occupation, ship broker.

Q. And owner?

A. And owner in a small way of vessels, but my occupation is ship broker.

Q. Now, Mr. Curtis, will you be kind enough to state whether you are the Mr. Curtis who purchased the schooner "Ellen Tobin" of Park Agnew?

A. Yes, sir.

Q. What did you give for her, Mr. Curtis?

Mr. BARNARD: Question objected to as incompetent and irrelevant.

A. \$1,000.

Q. And what did you spend on the repairs on the "Ellen Tobin" since you have owned her and her outfitings? Give the aggregate.

Mr. BARNARD: Objected to as incompetent and irrelevant.

A. I have spent about \$11,375.

Q. Did that include the sails?

A. Yes, sir.

Q. Did that include her painting?

A. Yes, sir.

Q. Did that include her rigging?

A. Yes, sir.

956 Q. When she left Alexandria was she freighted?

A. Low; yes, sir—no; not when she left Alexandria; she was light. She came to Georgetown light.

Q. You don't understand me. Where did you repair her?

A. At Alexandria, Va.

Q. After she was repaired did she go away from here freighted?

A. She went away from Georgetown freighted. After she was repaired at Alexandria I sent her to Georgetown for a freight.

Q. What kind of freight?

A. Coal.

Q. How much coal did she carry away?

A. 611 tons.

Q. State what was done with the hull of the "Ellen Tobin" during her repairs. How much was cut out of her?

A. I could not say exactly. I did not measure. I know we put 52 feet of keel in her.

Q. What amount of her did you take out?

A. We took out what I call the stomach.

Q. How much stomach did you take out?

A. I can only estimate. I cannot tell.

Q. Did you take it out as long as the keel?

A. No, sir.

Q. What width did you take it out?

A. I should judge we took out 16 or 18 feet on each side.

Q. On each side of the keel?

A. Yes, sir.

Q. Including the bend?

A. Including the bend, I should think about 36 feet.

Q. Perpendicularly across the vessel what width was the opening made up?

A. I suppose about 28 feet.

957 Q. When she went away did she have the original sails that were on her before the injury?

A. Yes, sir.

Q. She had them?

A. Yes, sir.

Q. What was the history of them? Tell us about that, Mr. Curtis.

A. I had the spanker—I took the sails out of the house—

Q. Where were they?

A. In Alexandria. When I went away they had the sails in Alexandria.

Q. And you took them out?

A. And I took them out and spread them on the ground at the ship yard.

Q. And spread them on the ground at the ship yard?

A. Yes, sir.

Q. And you shipped them when?

A. I shipped the spanker and flying jib to Norfolk.

Q. For what purpose?

A. To have them fixed up. They were chafed on the aft leech.

Q. You shipped them to Norfolk?

A. Yes, sir.

Q. And then did you use those original sails on the "Tobin"?

A. Yes, sir.

Q. For how long?

A. Then bended these sails and went to Boston, and from Boston to Kennebec, and from Kennebec to Richmond, and from Richmond to New York.

Q. Then what happened?

A. When we got back from Boston we found that the sails had little holes in them all along from the top to the bottom and  
958 unseaworthy, not fit for use on a vessel trading at sea, and we contracted then with Thorpe.

Q. For what?

A. For a new for-sail, mainsail, and spanker.

Mr. BARNARD: This question and all the proceeding questions about the sails are objected to as irrelevant and incompetent.

Q. Now, Mr. Curtis, to what did you attribute the fact of those sails being in that condition?

A. Lying in the house all furled up in a damp condition.

Q. What did the new sails cost?

A. I could not say. I could approximate about four or five hundred dollars. The bill is in Richmond.

Q. Between four and five hundred dollars?

A. Yes, sir.

Cross-examination.

By Mr. BARNARD:

Q. Do you still own the schooner?

A. The biggest portion of her.

Q. What is her name now?

A. Mary Curtis.

Q. When was the name changed?

A. Her name was changed, I think, in July of 1894.

Q. All this testimony you have given about the sails, &c., and the sailing from one port to another applied to the new schooner, applied to the Mary Curtis?



A. Yes, sir.

Q. This estimate you gave of \$11,375, does that include the new sails?

A. Yes, sir.

Q. And all the other changes and repairs you put on the  
959 boat yourself?

A. Yes, sir; outside of the cost of the vessel.

Q. Do you know how much of that cost was occasioned by the injury that the vessel sustained in sinking in the river at George-town?

A. I do not.

Q. Do you know how much of it was occasioned by the boat's timbers being rotten?

A. None.

Q. Why did you take out so much of the stomach?

A. Because she was a centerboard vessel and they wanted to make a keel vessel of her.

Redirect examination.

By Mr. HAGNER:

Q. Was there any other reason for taking out so much stomach? Was she broke?

A. Yes, sir.

Q. How much?

A. The lower timbers were shoved up when the centerboard went up.

Q. Shoved up by what?

A. That I cannot tell.

JOHN A. CURTIS,  
By RUTLEDGE WILLSON, *Sp'e'l Com.*

Subscribed and sworn to before me this — day of —, A. D.  
1895.

— — —,  
*Examiner in Chancery.*

960 And CHARLES J. FOX, a witness produced on behalf of libel-  
ants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. Mr. —, state your business.

A. Building and trimming vessels.

Q. For whom?

A. For anybody who employs me. I have got no particular parties to work for. Sometimes I work for Captain Curtis and the Old Dominion Ship Co. and those trading down there.

Q. Are you connected in any way with the mariners' association?

A. I am surveyor and agent for the American Ship Masters' Asso-

6780  
ciation of New York for the Richmond district. It is true Alexandria was not in our district, but Captain Curtis wrote to the house in New York and consented that I should take charge of it.

Q. Did you superintend the repairs on the "Ellen Tobin"?

A. Yes, sir.

Q. In Alexandria?

A. Yes, sir.

Q. What did you rate her at when finished?

A. I finished her at A 1½ for five years.

Q. Now, is A 1½ a higher or lower rate than A No. 1?

A. No, sir; A 1½ is a lower grade—one grade lower than A 1—and A 1½ is the next best rate he can give.

Q. Captain Fox, how did you repair the "Ellen Tobin"—what sort of a vessel did you make of her? Did you make any alteration in the characteristics of the "Tobin"? What kind of a vessel was she?

A. She had been a centerboard vessel, and Captain Curtis, when we looked at her and after we got her up and on the ways, 961 thought we would reconstruct her and take out the old centerboard, which was badly broken, and I knew that would make it stronger—a stronger vessel—and also carry more cargo than she did with a centerboard, and he and me determined to reconstruct it without a centerboard.

Q. Do you know what a new centerboard would have cost for the "Tobin"?

A. I can only approximate it. A new centerboard and centerboard well would cost, I should think, about \$1,000.

Q. Captain, how large a part of what Mr. Curtis called the stomach of the "Tobin" was taken out?

A. Well, sir, I should think—I know we took out from forty to fifty feet of keel, and the keelson on the inside of the ship runs parallel with the keel.

Q. And right alongside of it?

A. No; the keel runs along and the floor timbers cross the keel, and on top of the floor timber on the inside the keelsons run parallel with the keel.

Q. They lay flat against the keel, did they not?

A. No, sir; the keelsons don't touch the keel.

Q. They lay above the keel?

A. They lay above the keel the thickness of the throat and the floor timbers. The keelson lay above the keel—about three or four inches in this case above above the keel—hence the keelsons don't touch the keel.

Q. What do you call that part of the timbers that does touch the keel?

A. The floor timbers.

Q. The floor timbers touch the keel?

A. The floor timbers lie crosswise.

Q. Do sister keelsons touch the keel?

A. No, sir; no keelsons touch the keel in the vessel. The  
 962 floor timbers cross this way (indicating), and those are shifts  
 here, and inside the shifts is the keelsons. In other words,  
 the keelson helps to clamp the keel to the floor timbers altogether.

Q. The keelson helps to clamp the keel to the floor timbers and the keel and the keelson together?

A. Yes, sir; and I put great stress upon the importance that the strength of the keelson exercises in regard to the whole ship, hence Captain Curtis and myself conferred a little and I put in two more streaks of keelson, more than Captain Curtis thought that I ought to have put in, but I was glad after that that I did it, and I felt very proud of the job, and went soon to see it afterwards in Richmond and I didn't regret I put them in.

Q. Do you remember whether or not there were any spikes in the "Tobin"?

A. Oh, there were spikes in the "Tobin."

Q. When were these spikes put in?

A. The spikes are put in principally in planking the vessel.

Q. When the vessel is building?

A. When the vessel is building—putting the planking on. There is no opportunity then to have the planking treenailed at that time, but it is fastened with spikes.

Q. And then what is done?

A. Then, after that, the vessel is treenailed and what we call butt-bolted.

Q. Now I want to ask you this: Did you or not see on the star-board side of the vessel and below her "water-light" mark any spikes there or places where spikes were?

A. Oh, we cut in when we done the work upon the vessel, and I could not have inspected her at all without seeing the spike-holes, tearing off old planking and cutting it and all that. We had to come in contact with spike-holes; bound to do it.

963 Q. How did you get the planking off the "Tobin"?

A. We found it a difficult job to get it off. It was thoroughly fastened, bolted, and treenailed and fastened. We had to saw and cut and split. It was a good deal of expense that was incurred, the tearing apart of the work.

Q. Why?

A. Because it was put together in a manner that held it and caused much labor to get it apart.

Q. What was the character of the "Ellen Tobin" as to strength?

A. I think she was a very strong-built vessel in her frame; we call the timbers with the planking—the first ribs put on, we call them the frame.

Q. The timbers—

A. I noticed that they was larger than I had ever seen in a vessel of her tonnage; I called Mr. Curtis' attention to it, that she had larger ribs than I ever saw in a vessel of her tonnage.

Q. Do you remember what size ribs they were?

A. The floor constituted part of the ribs. The first futtocks con-

stitutes a part of the ribs, and each frame is constituted by a certain number of futtocks we call floor timbers.

Q. Now, I want to ask you this: What was the size of the timbers on the "Tobin," do you know?

A. What is the size?

Q. What was the size of the ribs?

A. The floor timbers seemed to be 12 by 12 inches.

Q. What is the size of the spike-holes that are put in vessels like that to hold the planking on the ribs?

A. The planking was three and one-half inches.

Q. And what is the size of the spikes?

A. We generally average the size of the spikes to go into the timber floor the thickness of the planking when fastened to  
964 it; that would make the spikes seven inches long.

Q. The spikes that were put in the "Tobin," were those spikes put in there to hold her before the treenails were put in? Were the spikes allowed to go through the ribs?

A. No; they were not long enough to go through.

Q. Will you be kind enough to tell us how treenails are put in?

MR. BARNARD: The question is objected to and all this line of questions. We are not building a boat here. It is objected to as incompetent and irrelevant.

Q. Will you explain how the treenails were put into the "Tobin"?

A. The treenails—first you bore with an auger in her case. They were one and one-eighth inches.

Q. In width?

A. In diameter, the treenails, and I demanded that they put in the best material—that is, locust. The hole is bored one and one-eighth in width from the outside all the way through the planking and timbers and ceiling, all the way to the inside.

Q. And then what is done?

A. And the treenail is driven from the outside through and through.

Q. How long are the treenails generally when you drive them in there?

A. About two feet.

Q. Then what happens?

A. Then there is a man comes along on the inside and he gets that on the inside and wedges it.

Q. What is the hood a vessel has?

A. In planking a vessel, putting on the planking on the outside, we call the planking that runs up against the stem on either side—the planking that runs up and reaches the stem—we call that the forehood, and it is marked with a piece of chalk, and it is picked up and shoved along—the starboard forehood.

965 Q. The starboard forehood and the port forehood?

A. Yes, sir; another hood is the planking that runs to the extreme aft part of the vessel; we call that a starboard aft-hood and port aft-hood.

Q. What would the cost have been, more or less, if the "Ellen Tobin" had been refitted with a centerboard?

A. Well, it would cost considerably more money to have refitted her with a centerboard.

Q. And a centerboard well?

A. And a centerboard well, because the old well was entirely mashed up and crushed and would have to be reconstructed entirely, and it would have cost more money to have rebuilt her with a centerboard than to have rebuilt her in the manner we did without a centerboard by \$1,000.

Q. What you took out of what Mr. Curtis calls the stomach, was that because you were going to make a keel-boat of her or would that have been necessary if you—

A. It would have been necessary.

Q. Why?

A. On account of the crushing and breaking of the timbers.

Q. I think you already stated the length of the stomach you took out?

A. Yes, sir.

Q. When did you first see the "Tobin" in Alexandria, Captain?

A. I cannot tell the date exactly, but I was called with Captain Curtis to go there. She was then lying at the wharf and so had to be taken out of the water that day. We had them to take her out of the water.

Q. Do you remember what month it was?

A. I haven't my memorandum here. I think it was in April. It might have been the latter part of March.

Q. But you think it was in April?

966 A. I think it was in April.

Q. What condition would you have said the "Ellen Tobin" was in when you found her there?

A. What condition?

Q. That is, when you first saw her there?

A. They hauled her out on the ways, and I was surprised to see how badly she was crushed amidships. Her keel was broken, pushed up in this way like a camel's back in the middle, and there are stanchions that stand from the keelsons up under the lower deck beams, and stanchions again from the lower deck to the upper deck beams, all resting upon the foundation below, which is the keelsons and the keel. All that was pushed up to such a degree that five beams was broken in each one of these decks, broken right in half.

Q. I want to ask you from your knowledge as inspector of vessels and your experience in that business whether, apart from the injury caused by the obstruction the "Tobin" had come in contact with there was anything about the Tobin's condition that would indicate she was a leaky vessel.

A. I saw nothing to indicate that.

Q. What did your business as inspector require you to do with the "Tobin"?

A. My business as inspector was to determine the condition of the

vessel and examine her thoroughly in all her parts and report to the chief who was in New York, and he requires me always to open vessels—that is, take off the outside planking, and all vital parts along between wind and water up along the stern, under the counter; take off outside planking so as to expose the timbers to see what condition they are in, whether sound or not, and the same we do along midships on both sides, starboard and port sides, so as to see the timbers there.

967 Q. What was the condition of her timbers, Captain, apart from the injury she had sustained on account of the obstruction she had come in contact with?

A. My report to my company—

Q. Never mind about the report.

A. Well, good.

Q. The condition was good?

A. The condition of the timbers as to soundness were good.

Q. Was there anything to indicate that she had been leaking in her condition?

A. In her condition before the—

Q. Apart from the injury caused by the obstruction?

A. I saw nothing to indicate she had been leaking before she got into that trouble.

Q. Could you see any marks on her to indicate what was the object she had come in contact with on her bottom?

A. No, sir; I could not presume to determine what she got on.

Q. Did you see any marks there at all?

A. No, sir; I could not tell that, it was all scarred and mashed to such a degree.

Q. Did she show whether she—

A. I ordered them to cut the keelsons out and cut out those timbers, and I was back in a day or two and all these timbers were cut out and scarred. To determine what done the damage that was no part of my business, and I didn't look into it.

Mr. WILSON: I object to all the testimony of this witness on the ground that it is not competent as rebuttal testimony. The testimony should have been produced in chief. It is not admissible at all.

Mr. HAGNER: Mr. Hagner states that it is rebuttal testimony for the reason that it is to rebut Mr. Smith's testimony to the effect that the "Ellen Tobin" might have been leaking.

968 Cross-examination.

By Mr. WILSON:

The WITNESS: In my testimony I gave the size of the timbers, 12 x 12. I thought I had it on my memorandum, but on looking over it I don't see it. I will ask that the size of the timbers that I gave be erased, as I don't remember that that size would be perfectly correct.

Q. You speak of a report made by you to your company. Was that report in writing?

A. Yes, sir.

Mr. WILSON: I would like to have a copy of that report, please, and if you have it make it and send it to the examiner.

The WITNESS: The reports I make to them are for them to make out reports, and I hardly feel at liberty to do so, because my business with them is just with them and with nobody else.

Q. Do you make an estimate of the cost of repairing her?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Do you know what the cost of repairing her was?

A. Well, I only know what Mr. Curtis put in evidence today.

Q. You know nothing of your own knowledge?

A. No, sir; nothing of my own knowledge about the cost of repairing her. When I was employed by Mr. Curtis he did not pay me for my services. I was paid by the company; my connection with the vessel so as to give it a class when done. I was representing the company in New York, and all my fees and business was with them. All I had to do with Captain Curtis, he traveled with me.

Q. You never saw her before she was injured?

A. I seen her, but never took much notice of her. She was at our port, but I knew nothing about her.

Q. When you first saw her she was in the water?

969 A. Yes, sir; she was in the water.

Q. And next you saw her on the dock?

A. They hauled her out on the railway the day I was there.

Q. On the dry dock?

A. On the marine railway.

Q. And you saw her?

A. Yes, sir.

Q. Did you examine her bottom then?

A. No, sir; it was late in the evening when they commenced to haul her up, and Mr. Curtis and me had to go to make the train and we left the vessel being hauled up, and I could not see under her bottom that day.

Q. Was that the first time she was hauled out of the water?

A. She was hauled out before, I understood, before Mr. Curtis bought her, but I didn't see her. We left her then being hauled up.

Q. You saw her the next day?

A. I saw her two or three days after.

Q. Did you examine her carefully?

A. Yes, sir.

Q. Did you notice in your examination whether anything had been done to the bottom recently?

A. No, sir; I didn't see that anything had been done to the bottom. Nothing had been done—nothing about repairing her—only she was hauled up and shored and propped on the railway; nothing else was done, no carpenter's work was done.

Q. From the line of the keelson to the highest point of the indentation, what was the distance?



A. It looked to me to be something over two feet.

Q. That would be over 24 inches?

A. Yes, sir.

970 Q. Did you measure it?

A. No, sir; that is the way it looked to me. Let me say it would be a little troublesome to get to measure it. You could look at it and judge it, but to get under it and get a dead straight line would be difficult. I did not think it would be important to measure and I did not do it.

Q. Did you then superintend the repairs?

A. Yes, sir; I ordered the repairs to be done.

Q. You ordered the repairs to be done?

A. I didn't do it with my own hands.

Q. Did you see it afterwards?

A. I saw it while doing and afterwards.

Q. And then you rated it A 1½?

A. Yes, sir; A 1½.

Q. What does that mean?

A. One degree less than A 1. A 1 is the highest and A 1½ is next.

Q. Why didn't you rate her at the highest rate?

A. Well, the highest rate is not given in all cases, Mr. Wilson, and I, in my judgment—Mr. Curtis wanted me to give her a better rate, but I stuck to what I deemed to be right, and in my own judgment, without consultation with anybody, I thought the A 1½ for five years, being second best, was a good rate. That backs her up in carrying any kind of a cargo anywhere, on any voyage. The American ship masters' book sets forth that vessels rated at A 1½ are capable of carrying any cargo on any voyage.

Q. I asked you why you didn't rate her A 1. What were the peculiarities and imperfections that caused you to rate her A 1½?

A. Mr. Wilson, vessels, brand-new vessels, vessels that are just built and launched, A 1 is all we can do for them. This vessel was not a new vessel, she was 20 years of age—that was her age, I think—and I didn't think I could give my consent to give her  
971 as high a rating as I would a brand-new, clip, and clean vessel just launched. I didn't think she was equal to a vessel brand new.

Q. What is the difference in insurance rates between A 1 and A 1½; is it considerable?

A. No, sir; very little.

Q. How much?

A. Maybe one and a half per cent., probably, or something of that kind.

Q. What was the value of the vessel at the time you rated her A 1½?

A. The value of the vessel?

Q. Yes.

A. Well, I shall have to ask to be excused about the value of the vessel, because that did not enter into my jurisdiction to determine about the value of vessels or anything like that, and it never crossed my mind at all.

Q. Had you ever been called upon to value a vessel?

A. Many a time.

Q. You are an expert on the value of vessels?

A. I would not like to call myself an expert. I have been ship-building all my life.

Q. To the best of your judgment, what is she worth when you rated her A 1½?

A. Well, I should say twelve or fourteen thousand dollars.

CHARLES J. FOX,

By RUTLEDGE WILLSON,

*Sp'cl Com.*

972 And JOHN B. LORD, JR., a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Direct examination:

By Mr. HAGNER:

Q. What is your age?

A. My age is 31.

Q. What is your business?

A. Clerk with my father.

Q. Will you be kind enough to state whether or not you were present upon the raising of the "Ellen Tobin" in November, 1893?

A. I cannot tell you about the date, but I was present at the raising of the "Ellen Tobin."

Q. Where was she sunk when you raised her?

A. At Mr. Smith's wharf.

Q. She was sunk at Mr. Smith's wharf?

A. Yes, sir.

Q. Will you state whether or not she was drawing 13 feet of water when you raised her?

A. She was not when I raised her.

Q. How much water was she drawing when you raised her?

A. The nearest I can get at it is 10 feet and not an inch over.

Q. Mr. Lord, what was the state of the tide when you raised her there?

A. The tide was about high tide.

Q. The tide was about high tide when you raised her?

A. Yes, sir.

Cross-examination.

By Mr. WILSON:

973 Q. How do you know what she drew?

A. I know that the tugboat was laying alongside, drawing eight and a half feet of water. I laid both side by side, and the Joseph Zane grounded in a little while, and I know the "Ellen Tobin" was not drawing over ten feet.

Q. Did you look at the marks at the bow and stern when you started to take her from the place where she was sunk?

A. No, sir; I didn't look at the marks. I was looking at the water.

Q. You knew the depth of the dock?

A. Yes, sir; a vessel was aground and I pulled her off.

Q. Where was she aground?

A. I don't know the name of the wharf, but right above Mr. Smith's place.

Q. You don't know what she drew after they took her away from the place where she was sunk?

A. I was there to raise her.

Q. How do you know she was drawing then ten feet?

A. Because I pumped her out and lay her ashore in about ten feet of water.

Q. And you didn't see the marks on the bow or stern?

A. I didn't see the marks on the bow or stern.

Redirect examination.

By Mr. HAGNER:

Q. Was one of your pumps on a dredge?

A. Yes, sir.

Q. One of your pumps is a dredge?

A. Yes, sir.

Q. How high was the "Ellen Tobin" from the deck of the dredge, which is your pump—how high was the "Ellen Tobin" when  
974 she was lying sunk there in comparison with the deck of your dredge?

A. She was below the deck of the dredge.

Q. When lying sunk?

A. Yes, sir.

Q. When you raised her there what was her condition?

A. She was above my head; her decks were above my head standing on the dredge where I tied a line onto the side of the "Ellen Tobin" and climbed upon the deck of the "Ellen Tobin."

Q. The highest point of the dredge is how much higher than the deck?

A. The house part?

Q. The dredge and the pumps and engine.

A. It is higher than a man's head.

Q. And in comparison with that when you lay alongside the "Tobin" was her deck higher after you raised her or lower than that part of the dredge?

A. About a level. I could stand on the deck of the dredge and put my hand on the "Ellen Tobin's" deck, like that (indicating).

Q. You would have to raise your hands over your head to do it?

A. Yes, sir.

## Recross-examination.

By Mr. WILSON :

Q. How long was it from the time you started the "Tobin" from the place where she was sunk till you put her aground?

A. I judge it was about 20 minutes.

Q. 20 minutes?

A. I just towed her right across and kept the two pumps running the whole time going there.

Q. And you made no measurement to see how much water she was drawing?

975 A. No, sir.

JOHN B. LORD, JR.,  
By RUTLEDGE WILLSON, *Sp'cl Com.*

Subscribed and sworn to before me this — day of —, A. D. 1895.

By agreement of counsel the testimony of witnesses taken at this session may be signed by the examiner.

An adjournment was here taken to meet on Tuesday, March 5th, 1895, at 3 o'clock p. m.

976 WASHINGTON, D. C., *March 5th, 1895—3 o'clock.*

Met pursuant to adjournment last noted.

Present: Same counsel, except Mr. Barnard.

Whereupon CHARLES E. L. B. DAVIS, a witness produced on behalf of libelants, being first duly sworn, testified as follows :

## Direct examination :

By Mr. HAGNER: Maj. Davis, will you be kind enough to state your name, residence, and occupation?

A. Charles E. L. B. Davis; major, corps of engineers, United States Army.

Q. And your occupation?

A. I have an engineer district under the War Department extending from the Patuxent to Fort Munroe.

Q. Major Davis, will you be kind enough to state whether you brought with you the original record of the report of the amount of stone that was delivered at Fort Munroe under the contracts that the Government had with Charles G. Smith & Sons?

A. I brought it.

Q. And they are here?

A. They are all here.

Q. Will you turn to the first one, for instance, Dec. 28th, 1891?

A. Page 124; this is the letter written by my assistant, Lieut. George A. Zinn.

Q. And what does that letter show?

A. It shows the total delivery on March 1st, 1892, of 883 cubic yards and  $\frac{2}{3}$ .

Q. And does it show there the vessels?

A. It shows the date of delivery and the name of the vessel and the number of cubic yards in each vessel.

Q. Will you mention the first vessel named there?

A. H. T. Hedges.

Q. That was what date?

A. That was Dec. 28th, 1891.

Q. And the next one was what?

A. Dec. 29th, 1891, "D. B. Steelman."

Q. How much was the "Hedges"?

A. 203 and  $\frac{1}{2}$  cubic yards.

Q. Of crushed stone?

A. Of crushed stone.

Q. And then how much did the "D. B. Steelman," the next vessel, deliver?

A. 94 and  $\frac{2}{7}$ .

Q. And the next?

A. 169 and  $\frac{13}{27}$ , and that was the "Watchful."

Q. And the "Puritan"?

A. 149 and  $\frac{2}{7}$  cubic yards.

Q. And the "Thomas J. May"?

A. 263 and  $\frac{21}{27}$ .

Mr. WILSON: I object to the question and answer as wholly immaterial and incompetent.

Q. Will you state whether or not you have compiled a statement containing the dates of the delivery by the various vessels therein named of crushed stone and containing the amounts delivered by each vessel under those two contracts?

Mr. WILSON: I desire to note an objection to the question as immaterial and incompetent.

A. Yes; I will certify to it as a true extract from the records of the office, giving the various dates of delivery, name of vessels, and number of cubic yards under each contract. The first in October 7th, 1891, and the second contract of March 27th, 1893.

Mr. HAGNER: I offer this in evidence, to be marked Exhibit No. 1, Davis, two sheets (filed separately).

Mr. WILSON: I object to the evidence as immaterial.

Q. Are you familiar with the rate of the current of the tide in this locality?

A. I would say the usual rate is between  $2\frac{1}{2}$  and 3 mices an hour, and it varies in wide limits and according to the wind and also the amount of water in the upper river.

Q. That would be the Aqueduct bridge?

A. That would be about at the bridge.

No cross-examination.

CHARLES E. L. B. DAVIS,  
By RUTLEDGE WILLSON, *Sp'el Com.*

And ABRAM KROOM, a witness produced on behalf of libelants, being first duly sworn, testified as follows :

Direct examination.

By Mr. HAGNER :

Q. Mr. Kroom, will you give your name and residence and the occupation that you have, if any ?

A. Abram Kroom ; 1025 30th street, Georgetown ; occupation, watchman.

Q. Mr. Kroom, where were you employed in August, 1893 ?

A. At Mr. Smith's.

Q. How ?

A. As watchman.

Q. Day or night watchman ?

979 A. Night watchman.

Q. When did you first go to the watchman at Mr. Smith's ?

A. The 4th of July.

Q. On the 4th of July, 1893 ?

A. On the 4th of July, 1893.

Q. Where were you on the night of Saturday, the night before the schooner "Ellen Tobin" sunk ?

A. I was watching there, sir.

Q. What time did you get down there that evening ?

A. About half past five.

Q. What did you do when you got there, Mr. Kroom ?

A. I went over the scows.

Q. You looked over the scows ?

A. I looked over the scows to see which had water in, first.

Q. First you looked over the scows to see which had water in them ?

A. Yes, sir.

Q. Then what did you do ?

A. The loaded scows first.

Q. Then what did you do ?

A. Then I went and pumped that out.

Q. Now, what scows did you pump out first ?

A. Well, there was several of them lying behind the "Ellen Tobin."

Q. Behind—that is, at her stern ?

A. Yes, sir.

Q. Was that up or down the river from the "Ellen Tobin."

A. Down the river.

Q. What did you do then ?

A. I pumped them out first, what needed to be pumped out.

Q. Then what did you do ?

A. I got done then about 10 o'clock that night and went  
980 up to the scow what they had been unloading that evening.

Q. Where was that ?

A. She was half unloaded, sticking down on one end.

Q. What was the other half loaded with ?

A. Stone.

Q. And where did that scow lie?

A. Up at the head of the "Ellen Tobin."

Q. Were there any other scows but that one there?

A. No, sir; just the one.

Q. What did you do with that one?

A. I found a good deal of water in her and commenced pumping her out and I did not get her pumped out till about 4 o'clock in the morning. You see, it kept leaking pretty smart, and I went up for the carpenter, Hanson Burrill, about 4 o'clock in the morning.

Q. What happened then?

A. Then I came back and there was right smart more water coming in again and he set to calking that scow and I kept on pumping again till 6 o'clock, and then the day watchman came and I went home.

Q. What scow was that scow that was up ahead of the "Ellen Tobin," do you know?

A. It was either No. 7 or 17; I am not certain about that. It was one or the other.

Q. Why do you think it was one or the other?

A. Because I know there was "7" on it.

Q. You don't know whether it was No. 7 or 17?

A. No, sir.

Q. Did you know the scow called Jumbo?

A. I never had her in my fleet, never.

Q. She was not in your fleet?

A. No, sir.

981 Q. She was not ahead of the "Tobin" that evening?

A. No, sir.

Q. Was she behind the "Tobin"?

A. No.

Q. You say that was the only scow ahead of the "Tobin"?

A. Laying at the head.

Mr. WILSON: I object to the question as leading and incompetent.

Q. Did you see anything about the "Ellen Tobin" that evening that would indicate she had been leaking that night?

A. No, sir.

Q. Did you see Mr. Speaker on Sunday?

A. After I seen she was sinking I went down to his house and told him she was sinking.

Q. Where were you when you saw she was sinking?

A. I seen it just off the Aqueduct bridge.

Q. What time of day?

A. I suppose between 12 and 1 o'clock.

Q. Then you went down and told Mr. Speaker she was sinking?

A. Yes, sir.

Q. What did he do then?

A. I don't know what he done.

Q. Had he heard it before, that she was sinking?

A. I don't know about that.



Q. When I came to see you at your house, Mr. Kroom, some time ago, before I left did you ask me to do something for you?

A. Yes, sir.

Q. What was it?

A. I asked you then that I would like you to get me a position as watchman somewheres where I could be the whole year round, and if you didn't think I might get some way to get a job from the District government.

982 Q. Did you ask me to prepare a petition for you to the Commissioners?

A. Yes, sir.

Q. What did I tell you?

A. You told me you would.

Q. Did I give you that with my name on the back of the envelope?

A. Yes, sir.

Q. And I prepared that petition for you, did I?

A. Yes, sir.

Mr. HAGNER: I ask that that petition be put in evidence, which is marked Exhibit Krone No. 1.

It is agreed by counsel that the examiner make a copy of said petition and file in place of original. Filed at page No. 148<sup>2</sup>.

Q. Did you take that petition to Mr. Smith to sign for you?

A. Yes, sir.

Q. Did he sign it?

A. No, sir.

Q. Why didn't he sign it?

A. He objected to sign it.

Q. Did he say he would not sign it because it was in my handwriting?

A. No, sir: he didn't say that.

Cross-examination.

By Mr. WILSON:

Q. You showed this paper prepared by Mr. Hagner to Mr. Smith, didn't you?

A. Yes, sir.

Q. Did you tell him who prepared it?

A. I told him a gentleman up the street had wrote it.

Q. You didn't tell him Mr. Hagner had prepared it?

983 To the Honorable Commissioners of the District of Columbia:

I have the honor to apply to you for a position of watchman, either at the District building or at any of the property yards or at any place designated by your honorable body.

I have been engaged as watchman all my life.

Respectfully yours,

(Signed)

ABRAM KROOM.

We, the undersigned, heartily recommend Mr. Abram Kroom for the above position of watchman.

J. EDWARD LIBBEY.  
JOHN A. SWINDELL,  
*Lieut. 2nd Precinct.*  
W. T. AND F. B. WEAVER.  
A. H. ALVEY.  
W. L. NORDLINGER.  
LEWIS W. RITCHIE.  
J. E. DYER.  
HENDERSON SUTER, M. D.  
H. SOMMERS.  
JOHN LEITCH.  
RANDALL HAGNER.  
HENRY C. WINSHIP.  
WHEATLEY BROS.  
JOSEPH H. LEE.  
W. H. TENNEY & SONS.  
H. G. WAGNER.  
W. D. BRACE.  
GEORGE W. WISE.  
MAYFIELD & HUESTON.  
G. J. JOHNSTON.  
H. M. NEWMAN, M. D.

Libellants' Exhibit Krone No. 1. Rutledge Willson, sp'c'l com. 148<sup>g</sup>.

984 —. No, sir; I mean him, hem, and haw about it, and I told him it was Mr. Hagner.

Q. Did you take the paper out of the envelope?

A. Yes, sir.

Q. You didn't show him the envelope?

A. No, sir.

Q. You kept it in your pocket?

A. Yes, sir; I had it in my pocket. I generally took it out wherever I went.

Q. What is your occupation now?

A. I ain't doing anything now.

Q. How long is it since you had anything to do?

A. Just before January.

Q. Just before January?

A. Yes, sir.

Q. You were on the dock the night before the "Ellen Tobin" sunk?

A. Yes, sir.

Q. What time did you leave there?

A. 6 o'clock Sunday morning.

Q. Who was on board the "Tobin" at that time?

A. I could not say who was on board.

Q. Did you see anybody on board?

A. I didn't see anybody. The steward he came in between 12 and 1 o'clock.

Q. At night?

A. At night, and I would not know it was him, but he always had a fashion when he came in, he would say, Is that you, watchman? That is the way I knew it was him then.

Q. Did you see anybody else on the boat that night?

A. No, sir.

Q. Did you see anybody on deck in the morning when you left?

A. No, sir.

985 Q. Who did you leave on the dock when you went away?

A. The day watchman.

Q. Who was on watch on the schooner all night?

A. I didn't see anybody on watch on the schooner.

Mr. HAGNER: That last question is objected to on the ground that there is no necessity under the law for a watchman to be on a schooner at night lying in a harbor.

ABRAM KROOM,  
By RUTLEDGE WILLSON, *Sp'cl Com.*

By consent of counsel it is agreed that the testimony of the witnesses taken at this session may be signed by the examiner.

Whereupon an adjournment was taken to meet on Monday, March 11th, 1893, at 3 o'clock, at the same place.

986 MONDAY, *March 11th*, 1895—3.30 o'clock p. m.

Met pursuant to adjournment last noted and agreement of counsel.

Present: Mr. Randall Hagner on behalf of the libellants, the respondents being neither present or represented by counsel.

Whereupon HENRY A. WISE, a witness produced on behalf of libellants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

— Mr. Wise, you were a witness in this case before?

A. Yes; I was a witness in this case before as to photographs I took.

Q. State, Mr. Wise, if you on Wednesday evening, March 6th, took two more photographs.

A. Yes, sir; I took two more photographs.

Q. State the position in which you stood when you took the photograph No. 3, taken by you in this case.

A. Number 3 was taken 13 feet and 7 inches west, being five and a half paces from elevator, four foot ten inches straight back from edge of wharf, at a point north of wharf.

Q. Now state what that photograph shows, Mr. Wise.

A. This photograph shows that the stone-crusher and the bin and elevator are all the same building.

Q. State if in photograph Exhibit Wise No. 8, the photograph

which you formerly took—the present picture which we call Wise No. 3—shows part of that same side of the bin or elevator.

A. Yes; it shows part of the same side of the bin or elevator.

Q. You may also state whether your camera was in the same place or near the same place.

A. It was in the same place the other one was made in relative to the bin. Before I took Wise No. 8 I stood one foot back from the edge of the wharf. In taking the present picture, No. 3, I stood four feet back, north of the wharf line.

Q. State if you took another photograph.

A. The next one was made from Cumberland Bros.' boat-house wharf, in the middle of their float, six feet out on the float south from the line of the wharf of Cumberland and Son.

Mr. HAGNER: These two photographs I now offer in evidence, to be marked respectively Exhibits Wise No. 3 and 4, and filed in separate package-

Q. Did you measure with a tape-line the distance in the first picture you have mentioned here today?

A. Yes, sir.

Q. Besides stepping it off?

A. Besides stepping it off; measured it and stepped it off, both.

Q. What is your ordinary pace? Can you state?

A. My ordinary pace is 32 inches.

No cross-examination, the respondents not being represented by counsel.

HENRY A. WISE,  
By RUTLEDGE WILLSON, *Sp'c'l Com.*

Whereupon an adjournment was taken, to meet on further notice.

Subscribed and sworn to before me this — day of —, A. D. 1896.

\_\_\_\_\_  
*Examiner in Chancery.*

988

APRIL 4TH, 1895—3 o'clock p. m.

Met pursuant to notice and agreement of counsel.

Present: Same counsel as before.

Whereupon STEPHEN W. SMITH, a witness produced on behalf of libellants, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. Give your age, residence, and occupation.

A. Age, 39; residence, Richmond, Va.; occupation, mate and pilot on tugboat at present.

Q. How long have you been a seafaring man?

A. 19 years.

Q. And have you had experience in regard to repairing vessels?

A. Yes, sir.

Q. And have you had experience in regard to the loading of vessels?

A. Yes, sir.

Q. Now, Mr. Smith, will you be kind enough to state what connection you had with the schooner "Ellen Tobin"?

A. I had charge of her as general superintendent.

Q. At what place?

A. At Alexandria.

Q. And that was about when?

A. About the 5th day of March I taken charge of her, 1894.

Q. That was subsequent to Mr.——

A. Curtis.

Q. Subsequent to Mr. Curtis' buying her?

A. Yes, sir.

Q. Had she already some temporary repairs put on her at that time?

A. Yes, sir.

Q. So she might be put overboard from the railway?

989 A. Her bottom was temporarily calked, and tinning and galvanized iron nailed over her bottom.

Q. Tinning and galvanized iron nailed over her bottom?

A. In some places.

Q. What places?

A. Over the centerboard well, where it was broken.

Q. Was there anything the matter with the bottom of the "Tobin" elsewhere than where she had met this obstruction?

A. No, sir.

Q. Were there any nail-holes in her at that time that could leak?

A. No, sir.

Q. What was the condition of her bottom?

A. As good as could be.

Q. Did you ever see young Charles G. Smith in Alexandria?

A. Yes, sir.

Q. How often did you see him there?

A. On two occasions.

Q. What was he doing there the first time?

A. The first time he had a knife, probing into the corroding spike-holes.

Q. Did you say anything to him then?

A. No, sir.

Q. What — the doing the second time you saw him?

A. He had another man with him with an awl, probing.

Q. Who was probing with an awl?

A. I don't know Mr. Smith did, but the man with him.

Q. The man with him was probing with an awl?

A. Yes, sir.

Q. Where was that?

A. That was about from 12 to 15 feet on the starboard bow and one foot below her light line.

990 Q. What did you ask Mr. Smith?

A. I asked him what he was doing.

Q. What did he say?

A. He said he was a lawyer representing the Potomac Stone Co., and was examining the vessel for leaks.

Q. He said he was examining the vessel for leaks?

A. Yes, sir.

Q. What did he ask you in regard to the vessel?

A. He asked me what sort of a vessel she was.

Q. What did you tell him?

A. I told him she was a first-class vessel.

Q. What did he ask you in respect to the spike he picked the head off?

A. He asked me what it was.

Mr. WILSON: I object to that. There is no testimony, and I object to counsel stating that the witness said he picked the head off.

Q. What did you tell him?

Mr. WILSON: I object to Mr. Hagner stating that the witness said he picked the head off the spike, which was Mr. Hagner's interpolation.

A. I told him it was a spike put on the end of the plank and was put there to temporarily hold it until it was properly fastened.

Q. Fastened with what?

A. With a treenail.

Q. What plank was the spike in?

A. It was in one of the planks that was broken, the forward end of it.

Q. It was in the forward end.

A. The spike was in the forward end of the broken planks.

Q. How long was the plank?

A. About 45—42 to 45 feet.

991 Q. Mr. Smith testified that there was a chalk-mark around the spike-hole. Did you put that chalk-mark there?

A. Yes, sir.

Q. The letter O there, what was that done for?

A. The planking was to come out at that butt.

Q. And he asked you why you put that there?

A. Yes, sir.

Q. And what did you tell him?

A. I told him it was put there to let the carpenters know that they were to cut out to that butt.

Q. Cut out what?

A. The plank.

Q. Were they to take the whole plank out?

A. They were to take the whole plank out.

Q. The whole plank up to that place where you marked?

A. Yes, sir; to that place.

Q. And Mr. Smith asked you that and you told him, did you?

A. Yes, sir.

Q. Was that butt where that mark was made and where the spike-hole was that Mr. Smith spoke of—was that butt sprung at all?

A. No, sir.

Q. At that end?

A. No, sir.

Q. Could that leak?

A. No, sir.

Q. Did you take the awl from Mr. Smith?

A. He gave it to me.

Q. He gave it to you?

A. Yes, sir.

Q. And what did you tell him when he gave you the awl? What did you do with it?

A. I shoved it up in the spike-hole myself, and told him it only went up two or three inches and didn't amount to anything.

992 Q. Mr. Smith, how many pumps did the "Ellen Tobin" have on her?

A. Three pumps.

Q. What did you do with them?

A. Pumped the vessel out.

Q. I mean what did you do with the pumps—are they still on her?

A. Two of them are.

Q. Give me their locations.

A. One of them is aft, and one forward, and one amidships; one of them was right in the break, shoved up.

Q. Right in the break, shoved up?

A. Yes, sir.

Q. What was the character of those pumps, Mr. Smith?

A. Two of them were single-action Tanner pumps and one was a double-action Lowdes pump.

Q. I mean as to their power; were they good or bad?

A. They were good.

Q. They were good pumps?

A. They were good and in good order.

Q. There are still two on the "Tobin"?

A. Yes, sir.

Q. You took one out?

A. We done away with one.

A. And only have two now?

A. We done away with the 'midship pump.

Q. There was a gentleman that testified in this case named McDermott, and the second time he testified he is called McDevitt, and he testified that the indentation in the keel of the "Tobin" caused by the rock or injuries she suffered would not cause her to leak. What have you to say about that?

Mr. WILSON: I object to that on the ground that there is no such testimony.

993 A. She would sink inside of an hour.

Q. She would sink inside of an hour?



A. Yes, sir.

Q. Then that injury she received from that rock would cause her, in your opinion, to leak?

A. Yes, sir.

Mr. WILSON: I object to that as leading and incompetent.

Q. And she would sink in an hour?

Mr. WILSON: That is objected to as leading and incompetent.

A. Yes, sir.

Q. Would she sink in an hour without being pumped or being pumped or not?

A. Her hand pumps would not amount to a great deal. Perhaps that would make a little difference.

Q. But she would sink in an hour irrespective of the pumps at all?

A. Irrespective of the pumps. I judge by the holes in her, sir.

Q. Was there anything in the outer skin of the "Tobin" that would have caused her to leak except where injured by the rock or obstructions?

A. Nothing I could find.

Q. Nothing you could find?

A. No, sir.

Q. And did you look over her carefully?

A. Yes, sir.

Q. After you hauled the "Tobin" out on the ways, was there any change in her condition in respect to the distance at which her keel came above the cradle of the railway?

A. There was about three feet difference, sir.

Q. At the middle of the keel?

A. It was about three feet above the cradle.

994 Q. It was three feet above the cradle?

A. The middle of it; yes, sir.

Q. The middle?

A. Both ends touched on the railway.

Q. And the middle was above it?

A. Yes, sir.

Q. After you got her up, did she come back any?

A. Yes, sir; in about three weeks she settled about ten inches, I think.

Q. She settled about ten inches in three weeks?

A. Yes, sir.

Q. The witness, Mr. McDermott, at page 240 of respondents' testimony, says, "The weak spots about the 'Tobin's' centerboard would not cause her to leak." Were there any weak spots in the centerboard well other than those caused by the rock or obstruction with which she met?

Mr. WILSON: That is objected to as assuming a fact not having been previously testified to.

Mr. HAGNER: The diver, Pierson, testified that when he went down to pump the stone out that the rock had shoved up the bottom just as the deck had been shoved up.

Q. Mr. McDermott, at page 239 of his testimony, says that he does not think that the "Tobin" got on any obstruction six feet above the bottom of the berth, and as a reason for saying that he says if she had gotten such obstruction it would have shown in her bends. Please state if, in your opinion as a repairer of vessels, that is correct.

A. Her rigging gave way before her bends did and left the lashing free and chains free to go. If the rigging had not given way, no doubt the bends would have bent.

Q. What would the fact of the bends not being affected  
995 after the rigging had given way—what would that indicate?

A. It would indicate that the vessel was strong and good.

Q. It would indicate that the vessel was strong and good?

A. Yes, sir.

Q. Mr. McDermott testified at page 246 that the object the "Tobin" was on, in his opinion, was a small one. Is that correct?

Mr. WILSON: Objected to as incompetent and immaterial.

A. No, sir.

Q. Why?

A. Because the break was over 18 feet wide and at least 40 or 45 feet long. It must have been a large obstruction.

Q. Could you see the indentation, caused by the obstruction, in the bottom of the vessel?

A. Yes, sir.

Q. And as you say it was 18 feet wide and 40 to 45 feet long?

Mr. WILSON: That is objected to as leading the witness rather than a question.

A. Yes, sir.

Mr. HAGNER: It is just to get the testimony down properly so the stenographer will not make a mistake.

Q. Did you put a centerboard in the vessel, Mr. Smith?

A. No, sir.

Q. Would it cost more or less to put a centerboard in?

A. It would have cost more.

Q. How much more?

A. They figured on a \$1,000 more; they estimated on \$1,000 more.

Q. Were there any dunnage planks in the "Tobin" under the crushed stone?

A. No, sir.

Q. Would dunnage planks have been required with a cargo of that sort?

A. It was an unperishable cargo and didn't require it.

996 Q. An imperishable cargo does not require it?

A. No, sir.

Q. Were there any bulkheads or partitions in the "Tobin"?

A. No, sir; except her chain locker forward of the foremast.

Q. How far up did that partition extend, and was it an open one?

A. It was about 8 feet open at the top.

Q. Were there any water-tight compartments or partitions of any kind in the lower hold?

A. None except in this chain locker.

Q. And this was an open partition?

A. Yes, sir.

Q. And would that have prevented water from reaching the pumps?

A. Oh, no, sir.

Q. What was the object of that little partition forward?

A. It was to keep the chains from interfering with the cargo.

Q. You say there was no partition, then, except the one that was forward of the mainmast?

A. Yes, sir; forward of the foremast.

Q. In the lower hold of the "Tobin"?

A. In the lower hold.

Q. What *the* size of the floor timbers or ribs of the "Tobin"?

A. The floor timbers were 12 by 12.

Q. 12 by 12 inches?

A. Yes, sir.

Q. And her futtocks?

A. They were 10 by 12.

Q. What was the distance between the futtocks and the floor timbers?

A. 4 or 5 inches; 4 or 5 inches all the way along.

Q. Was there any space in there to take in any water to cause any sinking in the "Tobin"—any space under the ceiling?

997 A. No, sir.

Q. Now, Mr. Smith, if there had been water above the ceiling of the "Tobin" three or four inches deep, a foot wide and three or four feet long, what would that indicate, she being loaded more in the stern than she was forward?

A. Four or five inches deep?

Q. Three or four inches deep, a foot wide, and four feet long?

A. That would not indicate anything.

Q. Would that be enough water to hurt her?

A. No, sir.

Q. Did you see the size of the stone in her?

A. Yes, sir; there was some crushed stone in her when I took charge of her.

Q. Did you see the size?

A. About two inches, about the size of an egg.

Q. Would the character of that cargo prevent water from getting to the pumps?

A. No, sir.

Q. Suppose she had been tipped by the stern and then tipped by the head forward, would the water in the stern have run to the pumps at the bow?

A. Yes, sir.

Q. At her head?

A. Yes, sir.

Q. Have you read the testimony of Isaac Taylor, a witness for the respondents, at page 175 of the Record?

A. Yes, sir.

Q. At page 175 of the Record Isaac Taylor has stated, in reply to a question of Mr. Wilson's: "Q. Describe, if you please, what water you saw, where it was, and what the quantity was. A. Well, 998 I could not tell what the quantity was exactly, sir. It was up on the skin; it came over the keelson and went down below and then went up on the skin of the vessel. I suppose there was about between four and five inches."

I claim there — an error of omission there, because the witness said, as shown by my stenographer's copy of the testimony, that it was alongside of the keelson, and if, as counsel insists, they will not change the record, I can only ask the witness a question based on the record as it now stands, which is this: Mr. Smith, if the water had been as Isaac Taylor is supposed to have stated, three inches over the keelson —

Mr. WILSON: I object to that, as no witness has testified to any such thing. Read what he does say and I have no objection to it.

Mr. HAGNER: The answer is this: "Well, I could not tell what the quantity was exactly, sir. It was up on the skin. It came over the keelson and went down below and then went up on the skin of the vessel. I suppose there was about between four and five inches."

I wish to ask you if the water came over the keelson how deep would it be?

A. The keelson is three feet.

Q. Could the man have trimmed stone alongside of the keelson?

A. He would be three feet in the water.

Q. He said he got one foot wet. Are those statements reconcilable?

A. No, sir.

Mr. WILSON: That is objected to as utterly incompetent.

Q. So that you say if the water came three inches over the keelson —

Mr. WILSON: Objected to as leading and argumentative.

Mr. HAGNER (continuing): It would have put the trimmer, 999 who was there near the aft cabin, in water three feet and three inches deep?

A. Yes, sir.

Mr. WILSON: Objected to on the ground that the witness Mr. Hagner pretends to quote from did not say that the water was three inches over the keelson.

Q. If the water had come over the keelson at all near the aft cabin, how would it be?

A. He would be in water three feet high.

Q. How high would the water be?

A. Three feet and over.

Q. To have gotten over the keelson?

A. Yes, sir.

Q. If, as Isaac Taylor says in his testimony, that there was a small amount of water lying close to the keelson three or four inches deep and four feet long and a foot wide, would that have made water enough in her to have been of any account?

A. No, sir.

Q. Would it have been many gallons of water or many barrels?

A. I could not say that; it would be a hard thing to come at. A vessel down by the stern two or three feet and a small amount of water in the stern end of her would not amount to anything.

Q. What would that state of circumstances indicate?

A. It would not indicate anything. It would indicate there was no water of any amount.

Q. Would a cargo of crushed stone, if screened just before being put into the "Tobin," allow or prevent water that might rise in her above the ceiling from reaching the pumps?

A. No, sir.

Q. You say it would not have prevented the water from reaching the pumps?

1000 A. No, sir.

Q. And, as you said already, I believe, the water would flow in the direction in which the vessel was tipped?

A. Yes, sir.

Q. Whether forward or aft?

A. Yes, sir.

Q. To the pumps which were situated forward or aft?

A. Yes, sir.

Q. If she was tipped by the head, which pump would the water run to?

A. The forward pump, sir.

Q. And if by the stern, it would run where?

A. To the aft pump.

Q. Did you notice, Mr. Smith, that there was a crack in the aft boom of the "Tobin"?

A. Yes, sir.

Q. Do you know whether or not it had been repaired?

A. It had been spliced.

Q. Would that render her unseaworthy?

A. No, sir. She went to Boston with it.

Q. In that repaired condition?

A. Yes, sir.

Q. Suppose a vessel, when fully loaded, would take a cargo of 600 tons and would draw 14 foot three or 14 feet—that is, at the deepest point, when fully loaded—when such a vessel loaded with 300 tons in the aft hatch and 100 tons in the forward hatch, reasonably trimmed, and she was dipping by the head 18 or 24 inches, what would that indicate?

A. It would indicate she was on something abaft of the amidships. A vessel with that quantity of cargo in her aft and that quantity forward ought to be at least two feet at the stern if  
1001 she was afloat.

Q. Why would that be indicated, Mr. Smith?

A. The weight of her cargo.

Mr. WILSON: That is objected to as unintelligible.

The WITNESS: 300 tons in her aft hold and 100 tons in her forward hold certainly does not balance. She is bound to be by the stern if she is afloat.

Q. If a pump sucks after 25 or 50 strokes of the pump after the vessel standing all day without pumping, what does that indicate?

A. It indicated she was tight.

Q. It indicated she was tight?

A. Not making any water.

Q. It indicated she is not a leaking vessel?

A. Yes, sir.

No cross-examination.

By consent of counsel the testimony of this witness may be signed by the examiner for the witness.

STEPHEN W. SMITH,  
By RUTLEDGE WILLSON, *Sp'cl Com.*

1002 At the same time and in the presence of the same counsel also appeared THOMAS BERRY, a witness produced on behalf of libelants, —, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. Mr. Berry, state your full name.

A. Thomas Berry.

Q. Were you present when the "Tobin" was first taken up on the ways in Alexandria, after the injury to her?

A. Yes, sir.

Q. When was that?

A. Well, I don't know what time it was, now. I think it was some time in January.

Q. Some time in the month of January, 1894?

A. Yes, sir; some time in January. I don't remember exactly.

Q. You were present when she was taken out on the ways?

A. I put her out myself.

Q. You put her out yourself?

A. Yes, sir.

Q. The first time she was taken out?

A. Yes, sir.

Q. When Mr. Lord brought her there?

A. Yes, sir; I took her out both the first time and second time.

Q. You took her out both the first time and second time?

A. Yes, sir.

Mr. WILSON: I object to Mr. Hagner's saying on behalf of the witness what the witness testifies to, "I took her out."

Q. Mr. Berry, what condition did you find the "Tobin" in irrespective of where the obstruction had come in contact with her?

1003 A. She was in very good condition.

Q. Were there any nail-holes anywhere that would cause her to leak at that time?

A. I don't think there were. You might make them leak by probing them and working them.

Q. She was a well-calked vessel at the time that you first got her out?

A. She looked to be; she seemed to be well calked. I heard she had been lately calked, about a year or so before that. Her seams would not leak; they were closed with cement everywhere—forward and aft.

Q. Is cement a proper material?

A. A good many of them use cement instead of pitching them.

Q. Mr. Berry, Mr. McDermott, or, as he calls himself in the latter part of the record, Mr. McDevitt, says that the weak points under the centerboard well of the "Ellen Tobin" would not cause her to leak. What have you to say about that, sir?

A. Well, I have got to say about that that if a vessel broke in two would not leak I don't know what would make her leak.

Mr. WILSON: I object to that. Mr. McDermott or Mr. McDevitt did not testify to any such thing.

Mr. HAGNER: I will swear now he did say it and I will give you the page where he said it, and I will read it, too.

Mr. WILSON: I object to the reading of the record.

Mr. HAGNER: At page 240 of the Record Mr. McDermott says, in answer to a question of Mr. Wilson's in reference to the well, which is, "Q. State what weak points there were and whether those weak spots were such as would, in your opinion as a shipwright, cause the vessel to leak? A. The weak spots about her centerwell would not cause her to leak."

Q. Mr. McDermott says, as I have quoted, that the weak spots in the "Tobin" under the centerboard well would not cause her  
1004 to leak?

A. It was the only thing that did cause her to leak, because she was broke in two.

Q. She was broken in two?

A. Certainly; yes, sir.

Q. Mr. Charles G. Smith, Jr., at page 22 of the Record, in answer to a question by Mr. Wilson, "Q. Describe her just as she looked to you. A. She looked about as a vessel would ordinarily look on a dry-dock, and she laid in good condition to look at. At the time I saw her hauled out she had had some timbers taken out right amidships, where there was a little raise in the bow." Now, that is what Mr. Smith says about the condition of the "Ellen Tobin." I ask you if there was anything the matter with the bow?



A. Nothing at all.

Q. And the place amidships, what was what he calls a little raised?

A. About two and a half or three feet.

Q. How far did it extend?

A. 50 feet, running from nothing 50 feet each way.

Q. You don't call that a little raise?

A. No, sir.

Q. What do you call it?

A. A big one.

Q. Was it enough to sink any vessel in the world?

A. Yes, sir.

Q. Could any vessel in the world help being ruined with that in her?

A. No, sir; no vessel in the world could stand that. There was nothing in the world the matter with the vessel either forward or aft, only where she sat on the rock.

Q. Only where she sat on the rock?

A. Yes; she was pushed right up in the middle and it pushed everything right up, too.

Q. The reason her decks raised up was what?

A. She struck on a rock. I suppose the rock could not get all the way up. It broke about 13 streak of plank on each side, right in the middle, bring her middle right up. It didn't interfere with the middle, only on the inside.

Q. Between the deck and the top of the keelson are there any pillars or stanchions?

A. Stanchions; yes, sir.

Q. Stanchions like pillars?

A. Yes, sir.

Q. And the keelson raising shoved the stanchions up through the decks?

A. Yes, sir; shoved the stanchions up through the deck, broke both her deck frames. The keel shoved the stanchions, deck, keelsons, and everything up.

Q. In a cargo of crushed stone which has been screened and which is about two inches in diameter, in a vessel of the character of the "Tobin," the size and character of which you know, would such a cargo prevent any water which might rise over the ceiling inside the skin of the vessel from reaching the pumps?

A. No; I think not.

Q. Or in any way or any direction she was tipped, whether tipped by the bow or stern, would such a cargo prevent the water from reaching the pumps?

A. No, sir; whichever way she goes the water goes, whether one way or the other.

Q. In a vessel of the character and size of the "Tobin" could any water between the futtocks and floor timbers that might get in there—could that cause her to sink?

A. No, sir.

Q. Why?

A. Because there is not enough space in there.

Q. It could not hold water enough?

A. It could not hold water enough in between her ceiling and hull if it did not get above that. Very little water could stay there, because she is solid with timber pretty much, and there is only four or five inches of space between the timbers.

Q. The timbers are how wide?

A. 12 inches, I think.

Q. Twelve inches by what?

A. 12 by 12 and 10 by 12.

Q. 12 by 12 for the timbers and 10 by 12 for the futtocks?

A. I think the floor timbers were 10 by 12 and the futtocks 12 by 12. The futtocks are the timbers that go alongside of the floor, and the floor timbers run across.

Q. I didn't ask you whether there were any bulkheads in the "Tobin."

A. No; there was no bulkheads in the hold.

Q. There was none in the lower hold?

A. No, sir; only up forward where the chain-house is—the chain-locker, they call it.

Q. What was the object of that?

A. That is merely to keep the chains in place.

Q. Did that go up to the top or not?

A. It went up to the windlass.

Q. How high were the hawse pipes above the water on the outside of the vessel when she was down by the head drawing 12 feet 10 inches?

1007 A. Well, I don't know.

Q. How high would it be?

A. I don't know how high it was.

Q. Could you tell how high it was?

A. It was out of the water considerable, but I could not tell how much; maybe 4 or 5 feet; I don't know, though. I didn't pay any particular attention to that.

Q. Was there anything the matter with the scupper-holes of the "Tobin" when you saw her?

A. The scupper-holes on deck, you mean?

Q. Yes.

A. No; nothing I know of.

No cross-examination.

THOMAS BERRY,  
By RUTLEDGE WILLSON, *Sp'cl Com.*

By agreement of counsel the testimony of this witness may be signed by the special commissioner for the witness.

1008 At the same time and in the presence of the same counsel also appeared RANDALL HAGNER, counsel for libelants herein, who appeared in their behalf, and, being first duly sworn, testified as follows:

I am obliged again to take the stand in this case because I was

the only person present, besides the active witnesses, and directed them to go down in the ice at certain places. Mr. Pierson was directed by me to go down 36 feet out from a point two and a half feet east of the elevator or bin at Smith's wharf, at a point 36 feet out from that point and on a line—practically the line dividing the Gilbert property on the east and the property leased by the Smiths, Charles G. Smith, Sr., and Charles G. Smith, Jr., on the west. I am sure that the point measured by Mr. Atlee and at which Mr. Pierson went down could not have been one and a half feet out of that line. Mr. Pierson had been down before, and I knew he was familiar with the rock and knew where to find it; therefore I put him at a point which was about the east end of that rock. On the other hand, when I came to put the diver, Mr. Olson, the Norwegian, down, I put him down at a point directly in the east line of the elevator and at a distance of 41 feet from the edge of the wharf. This I knew would put him directly on the place where the rock had been at the time the "Tobin" was injured. Long before the "Tobin" was taken up I had by ranges, as stated by Captain Hankins, located the position of that rock in relation to the vessel, shore, and elevator. There is a little range tree, which Mr. Atlee has spoken of in his deposition as being a stump 20 feet high and having a limb running to the left as you view it from Smith's wharf, by which I located the rock, and by that location I was enabled to put the divers down in the place where the rock should have been.

1009 Cross-examination of Mr. Hagner postponed until next session.

1010 At the same time and place and in the presence of the same counsel also appeared ERNEST G. LORD, a witness produced on behalf of libelants, —, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAGNER:

Q. What is your age, residence, and occupation?

A. My age is 29; residence, 603 9th S. W.; occupation, I am running a sand machine at present.

Q. Mr. Lord, were you present when the "Ellen Tobin" was first gotten out, in Jan., 1894, on the marine railway in Alexandria?

A. Yes, sir; and right aboard of her.

Q. Do you remember what day of the month it was?

A. Indeed, I do not.

Q. You remember it was about that time?

A. January, '94?

Q. January, '94.

A. I think it was about that time.

Q. Do you remember whether it was early or late in the month?

A. Now, that has kind of slipped my memory, about the time in the month.

Q. You say you took her out in January, I think it was?

A. Yes, sir.

Q. What was the character of her bottom when you took her out, apart from the injury she had sustained?

A. She looked as good as any vessel or tugboat or anything I seen hauled out. She was not leaking or injured and looked like a good, tight boat.

Q. She was not leaking anywhere, irrespective of the injury?

Mr. WILSON: I object to that. That is not what the witness testified.

Q. Would the injury she had sustained cause her to leak?

A. Would it?

Q. Yes.

A. I should think it would.

Q. What do you know about it?

A. I know it would. Her keel was shoved right up; broken in two.

Q. How high?

A. Well, it was shoved up her keel, her main keel, where it was not injured; it was shoved up six or eight inches; I suppose six inches inside of her bottom, you know.

Q. Could you see on the bottom of the "Tobin" the print of the obstruction that she came in contact with?

A. There was a place right where the break was where she looked as though she had been resting on something.

Q. Could you say how wide the object was from the indentations on the planking on each side of the keel?

Mr. WILSON: That is objected to as leading and incompetent.

Q. Do you remember whether there were any impressions on the planks?

A. Yes, sir; the planking was shoved up.

Q. Do you remember how wide that was on each side of the keel?

A. I don't know exactly, but it was a good wide place.

Q. Do you remember how many planks it was?

A. No, sir; I don't remember.

Q. Mr. Lord, were there any nail-holes? You looked carefully at the vessel.

A. Yes, sir; I went all around it.

Q. Were there any nail-holes in the vessel that would cause her to leak?

1012 A. I didn't see her leaking afterwards except just around that place where she was broken.

Q. And where was that?

A. That was right around the keel where she was broken.

Q. What part of the keel?

A. On the bottom.

Q. You looked all around the vessel?

A. Yes, sir; on both sides of her.

Q. Was there any water coming out of her there?

A. Where she was broken?

Q. Yes.

A. Yes, sir.

Q. Did it come out anywhere else?

A. No, sir; I didn't see her leaking anywhere else.

Q. There is a man who has testified here on behalf of respondent, named McDermott, and he says that the soft places there in the centerboard well caused by the injury would not cause her to leak. What do you know about that?

MR. WILSON: I object to that, as the witness did not testify to anything of the kind. He did not say that there were any soft places.

MR. HAGNER: He says that the injuries and soft places around the centerboard well of the "Tobin" would not cause her to leak.

MR. WILSON: I object to Mr. Hagner's stating what the witness testified to.

Q. State now whether the injury would cause the "Tobin" to leak.

A. Yes, sir; it would cause her to leak, because I could see when we pumped her out that she was leaking terribly.

Q. Where?

A. Right next to the well. We stopped up places, which, I suppose, caused us to get her up, on both sides.

1013 Q. You are familiar with vessels, are you not, Mr. Lord?

A. Yes, sir; I know right smart about vessels.

Q. How long have you been connected with the water?

A. About ten years—yes, longer than that. I have a tugboat license for 9 years.

Q. As what?

A. As pilot.

Q. Do you know what dunnage is in vessels?

A. Yes, sir.

Q. Dunnage planks?

A. Yes, sir.

Q. Were there any dunnage planks under that stone in the "Tobin"?

A. I didn't see any.

Q. Were you present in Georgetown when she was raised, Mr. Lord?

A. I was not there when she was raised. I was up there one day when they pumped the water down pretty low in her.

Q. Where was she leaking then?

A. Around the well inside.

Cross-examination continued until next session.

ERNEST G. LORD,  
By RUTLEDGE WILLSON,  
*Sp'c'l Com.*

Whereupon an adjournment was taken, to meet on Saturday, April 13th, 1895, at 2 o'clock p. m.

1014 SATURDAY, April 13th, 1895—2 o'clock p. m.

Met pursuant to adjournment last noted.

Present: Mr. Hagner on behalf of libelants; no appearance for respondents; whereupon—

HENRY W. BREWER, a witness produced on behalf of libelants, being first duly sworn, testified as follows:

Direct examination:

By Mr. HAGNER: Proctor for libelants protests against the case being constantly set down for hearing and counsel for the respondents not being present. An hour has passed without counsel appearing, and counsel for libelants insists on proceeding, even in the absence of counsel.

Q. Mr. Brewer, have you already testified in this case?

A. Yes.

Q. You are the Mr. Brewer who has already testified in this case?

A. Yes, sir.

Q. Do you know who Mrs. Barrett was formerly, who owned the property which the Potomac Stone Co. bought?

A. She was Julia Hastings.

Q. Who did she get the property from?

A. I don't know positively, but I think she inherited it from her uncle, Joseph Pearson, who formerly owned it.

Q. Who did Miss Hastings marry?

A. She married Barrett.

Q. And after Barrett's death who did she marry?

A. She married a man by the name of Foertsch.

Q. Is the wharf property of Mr. Henry P. Gilbert east or west of the Foertsch property or the Potomac Stone Co. property?

A. It is east of it.

1015 Q. Is the Baker wharf to the east of the Gilbert property or to the west?

A. John A. Baker?

Q. Yes.

A. It is east.

Q. East of the Gilbert property?

A. Yes, sir; first comes Gilbert's, which he bought of Cragin; then Gilbert's property, which he bought of Jarboe, and then comes Moore's, and then Baker's wharf.

Q. The property, then, leased by the Potomac Stone Co. or by Charles G. Smith and Charles G. Smith, Jr., which you have described in your plat, lies to the west of the Gilbert property, does it not?

A. Yes, sir.

Q. Since you have done some sketching on this map for Mr. Wilson, the respondents' proctor, will you sketch in red ink an

arrow, showing which is north on this map marked Libelants' Exhibit No. 7, Brewer?

A. (Witness marking map.) I have marked an arrow showing the north point, the arrow being the needle pointed north.

Mr. HAGNER: Proctor for libelants offers in evidence the deed from Mary J. Foertsch and husband to the Potomac Stone Co. of the same property described in the lease from the Potomac Stone Co., being an exhibit to the libel in this case, the deed now offered in evidence being recorded in Liber 1544, folio 234 *et seq.*, of the land records of the District of Columbia, to be marked Brewer No. 1, Rebuttal. (Filed separately.)

Q. How many pumps had the "Ellen Tobin" on her at the time you made this map?

A. Three.

Q. Describe where they were.

1016 A. One was forward, one amidships, and one aft. One is marked here on the map. I didn't sketch the other two pumps in, because I didn't know that it was necessary.

Q. I want to ask you whether these two lines of the Gilbert property, indicating the lines in red ink or Ex. Brown No. 7, run north and south.

A. The two lines of the Gilbert property run north and south (indicating on the map).

Mr. HAGNER: Cross-examination and all objections reserved in behalf of respondents.

HENRY W. BREWER,  
By RUTLEDGE WILLSON,  
*Sp'c'l Com.*

1017 At the same time and place also appeared RANDALL HAGNER, counsel for libellants, who, having been already duly sworn, continued his testimony as follows:

In my testimony of a few days ago I observe that I did not make it sufficiently plain. What I meant by "before the 'Ellen Tobin' was gotten up I had located the rock" was that before the "Ellen Tobin" was gotten up I located the bulge in the deck caused by the rock while she was still lying there by the range, tree, which I spoke of, and the shore line, two feet and a half east of the elevator or bins.

I desire to introduce in the testimony the record of the Shipmasters' Association, at page 201, for the year 1893, the record of the schooner "A. De Nike," three-masted schooner, American build; length, 131 feet; breadth, 30 feet and 5 inches; depth, 16 feet and 6 inches. She hails from Baltimore. She is registered at 406 tons. She was built in '66 at Greensboro, Maryland; owners, George W. Jones & Co. The book will be produced at the hearing to allow the court to see it.

I also want to offer in evidence the record from the same record of the Shipmasters' Association, at page 676, of the "Mattie B. Russell." She is an American schooner; length, 115 feet 9 inches;



breadth, 28 feet; depth, 14 feet 5 inches; her register, 252 tons. She is from Portland, Maine, and built in 1870 at Westbrook, Maine; owner, Peter S. Nickerson. The last survey was in Boston, ninth month, 1852.

I also want to offer in evidence the record from the same source of the schooner "Sunlight." There are three of that name  
1018 in the record, but I introduce the one from Fairhaven, Conn.

She is a three-masted schooner and an American vessel. She is 132 feet and 5 inches long, and she is 32 feet broad, and 15 feet 6 inches deep. Her registered tonnage is 349 tons. She was built in '73; owner, George I. Doe. The last survey was in New York.

RANDALL HAGNER.

Cross-examination reserved on behalf of respondents.

1019 At the same time and place and in the presence of the same counsel also appeared JOHN B. LORD, who was recalled for further examination.

By Mr. HAGNER:

Q. Mr. Lord, you have already been sworn in this case?

A. Yes, sir.

Q. Please look at Exhibit Hankins No. 3 and say what that paper  
is.

A. (Witness reads paper.) That is the contract.

Q. That is the contract you had under which you finally succeeded in pumping out the stone from the "Ellen Tobin"?

A. Yes, sir; for pumping out the stone from the "Ellen Tobin."

Q. That is your signature?

A. That is my signature on the back for the money.

Q. Mr. Lord, how long were you in pumping out the stone under the second contract?

A. Under the second contract I was the best part of three weeks. The contract called for two weeks, and I had the contracted extended one week longer.

Q. Mr. Lord, was there anything about the "Ellen Tobin" when you got her up on the railway in Alexandria which indicated that she was leaking or had leaked anywhere except where the rock came in contact with her?

A. I am positive there was not.

Mr. Hagner, counsel for the respondents, not having come, the further testimony is adjourned until Thursday, April 18th, 1895, at 5 o'clock p. m., at the same place.

JOHN B. LORD,

By RUTLEDGE WILLSON, *Sp'c'l Com.*

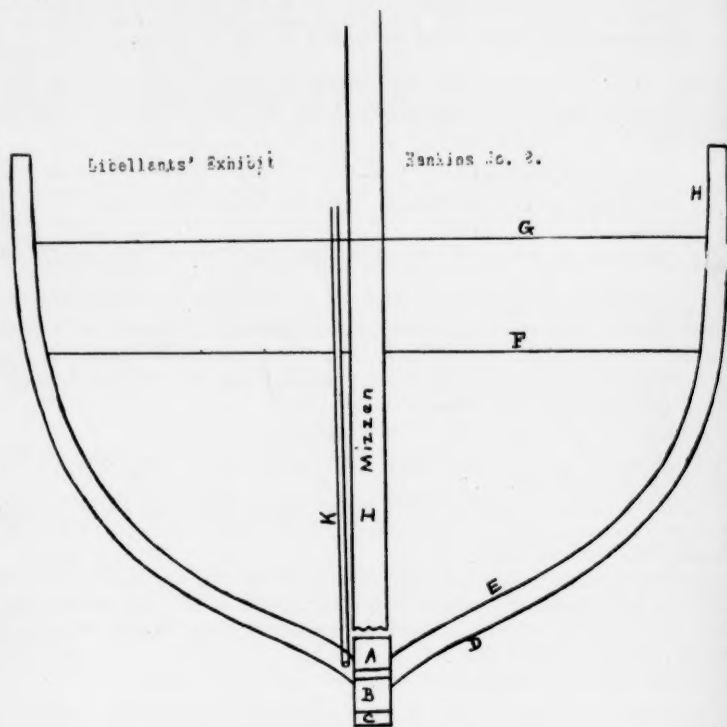
1020 Objections on the part of the respondents is reserved to the competency and relevancy of the foregoing testimony, and the libellants declare their case closed, & that counsel sign for the witnesses.

April 15, 1895.

NATH'L WILSON,  
RANDALL HAGNER,  
*Proctors for Respective Parties.*

(Here follows exhibit marked p. 1021.)

1022



*Section of vessel between timbers.*

- A, keelson.
- B, keel.
- C, shoe.
- D, planking outside.
- E, skin or ceiling.
- F, lower deck.
- G, upper deck.
- H, bulwarks.

I, mizzen-mast.

K, pump near mainmast, which, like all others, goes to within 3 inches of outside planking near keel.

1023

LIBELLANTS' EXHIBIT NO. 1, DAVIS.

*Statement of Broken Stone Delivered at Fort Monroe, Va., by Chas. G. Smith & Son.*

Contract of October 7, 1891.

Date of delivery.	Name of vessel.	Number of cubic yards.	
1891.			
Dec. 28.	Schooner H. D. Hedges.....	203 $\frac{1}{2}$	
29.	" D. B. Steelman.....	94 $\frac{2}{7}$	
1892.			
Jan. 19.	" Watchful.....	169 $\frac{1}{2}$	
22.	" Puritan.....	149 $\frac{7}{7}$	
Feb. 25.	" Thos. J. May.....	265 $\frac{2}{7}$	
			882.85
Mar. 3.	" W. H. Rutan.....	160.81	
8.	Barge E. E. Jackson & Co. #2....	283.10	
11.	" " " #5....	284.55	
21.	" " " #1....	287.44	
28.	" " " #3....	304.07	
30.	Schooner Francis C. Smith.....	141.55	
May 11.	" D. B. Steelman.....	154.55	
July 7.	Barge E. E. Jackson & Co. #3....	304.75	
16.	Schooner Jno. R. Fell.....	473.77	
23.	Barge E. E. Jackson & Co. #3....	307.66	
28.	Schooner Edna A. Pogue.....	283.83	
Aug. 3.	" Robert F. Mitcheli.....	217.37	
9.	" Jno. W. Bell.....	130.00	
18.	" Eva A. Danenhower....	312.00	
20.	" Murray Vandiver.....	144.44	
25.	" Amelia Hearn.....	188.48	
31.	" Abbie F. Cole.....	401.55	
Sept. 2.	" A. P. Richardson.....	135.04	
3.	" F. C. Eaton.....	124.22	
6.	" Tillie G. Cruse.....	140.11	
14.	" G. P. Keagle.....	62.11	
17.	" Sarah S. Tyler.....	247.00	
23.	" Jennie M. Huddell.....	384.22	
28.	Barge E. E. Jackson & Co. #2....	293.22	
30.	Schooner Lillie.....	133.60	
1024			
Oct. 1.	Schooner Francis C. Smith.....	139.39	
12.	Barge E. E. Jackson & Co. #3....	336.55	

Date of delivery.	Name of vessel.	Number of cubic yards.
26. Schooner	Hester A. Seward.....	224.61
Nov. 2. "	Sunlight .....	542.37
5. "	Lizzie Williams.....	324.26
14. Barge E. E. Jackson & Co. #1....		278.77
18. " " #5....		281.50
28. Schooner	Henry D. May... ..	389.26
Dec. 5. "	Wm. F. Burden... ..	202.94
16. "	Mattie B. Russell.....	449.22
31. "	S. B. Wheeler... ..	384.22

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10,335.38

1893.	Brought forward.....	10,335.38
Jan. 13. Schooner	R. F. Baird.. ..	315.61
Mar. 22. "	Edna A. Pogue... ..	275.89
Apr. 12. "	A. Denike .....	525.77
18. "	Wm. M. Powell .....	81.61
22. "	Frank Herbert .....	261.44
25. "	Neptune.....	77.27
27. "	Anna Maria.....	96.77
May 3. "	Jas. B. Dager .....	41.88

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12,011.62

## Contract of March 27, 1893.

May 9. Schooner	D. B. Steelman.....	148.05
June 1. "	Annie Belle.....	116.27
2. "	Harford Belle.....	44.05
6. "	B. A. Wagner.....	87.39
9. "	Watchful.....	179.83
12. "	W. H. Rutan.....	174.72
14. "	C. A. Traverse.....	202.22
15. "	H. P. Barnes.....	58.50
23. "	Chas. T. Straun.....	343.77
24. "	Alice Cary.....	61.39
30. "	Beulah Land.....	284.55
July 3. "	Alice Carlisle.....	83.77
6. "	Chas. G. Joice.....	207.27
7. "	Walter P. Snow.....	75.11
10. "	Richard Cromwell.....	176.22
17. "	Myra W. Stears....	241.22
20. "	Wm. F. Burden... ..	176.94
22. "	F. C. Smith.....	149.50
31. "	Flying Scud.....	145.89

1025

Aug. 4. Schooner	"C".....	216.66
8. "	Edna A. Pogue.....	273.72
17. "	H. G. Eley... ..	210.16
25. "	Three Brothers.....	184.88



Libellants' Exhibit Wise No. 3.







Libellants' Exhibit Wise No. 4.

*Smith et al*  
*vs.*  
*Burnett et al* } *Ex 1027*



Date of delivery.	Name of vessel.	Number of cubic yards.
31. Schooner Sarah Smith.....		361.83
Sept. 4. " F. C. Smith.....		143.00
8. " Beulah Land....		285.35
		<hr/> 4,632.26

Estimated amount of contract of October 7,		
1891.....	12,000	cubic yds.
Amount delivered.....	12,011.62	" "
Estimated amount of contract of March 27,		
1893.....	6,000	" "
Amount delivered.....	4,632.26	" "

I certify that the above is a true abstract from the records of this office.

CHAS. E. G. B. DAVIS,  
Major Corps of Engineers.

601 18th St. N. W., Washington, D. C.  
March 5, 1895.

(Here follow exhibits marked pp. 1026 & 1027.)

1028 LIBELLANTS' EXHIBIT BROWN No. 1, REBUTTAL.

Mary J. Foertsch *et vir* }  
to } Recorded Dec. 11, 1890, 2.25 p. m. Deed.  
The Potomac Stone Co. }

This deed made this 6th day of December, A. D. 1890, witnesseth that Mary Julia Foertsch formerly Mary Julia Barrett and Joseph C. Foertsch of the District of Columbia, parties hereto of the first part, for and in consideration of eleven thousand (\$11,000) dollars in current money of the United States to them paid by the Potomac Stone Company a body corporate duly incorporated under the laws of the State of Virginia party hereto of the second part, receipt of which at the delivery hereof, is hereby acknowledged, have bargained and sold, granted, enfeoffed, and conveyed, and do hereby bargain and sell, grant, enfeoff and convey unto and to the use of the said The Potomac Stone Company its successors and assigns the following-described land and premises with the improvements, easements and appurtenances thereunto belonging, situate and lying in Georgetown, District of Columbia, namely, all of lot numbered eighteen (18) and part of lots seventeen (17) and nineteen (19) in square numbered five (5) being described in one parcel as follows: Beginning at a point on the south side of Water street (223.58) two hundred and twenty-three and fifty-eight hundredths feet westerly from the west line of High street and running thence westerly with said Water street (76.20) seventy-six and 1029 twenty-hundredths feet to an alley running from said street south to the river, being the alley referred to in the report of the commissioners filed in 1831 in partition cause No. 75,

thence with said alley south to the channel of the Potomac river, thence with said channel easterly to intersect a line drawn south from the place of beginning, and thence with said line north to the place of beginning, and also all interest in any other part of said square or in and to any and all alleys, easements or ways in said square. To have and to hold the said land and premises, with the improvements, easements and appurtenances unto and to the use of the said The Potomac Stone Company, its successors and assigns forever. And the said parties of the first part, for themselves and their heirs do hereby covenant with the said party hereto of the second part its successors and assigns to forever warrant and defend the title to said granted premises unto the said party hereto of the second part, its successors and assigns, from and against all persons claiming the same or any part thereof, by, through or under the said parties hereto of the first part, and at the cost of the person requesting the same, to execute and deliver any other or further deed or deeds, deemed by legal counsel necessary to more fully assure the title to said granted premises unto the said party hereto of the second part, its successors and assigns. In testimony whereof the said Mary Julia Foertsch (formerly Mary Julia Barrett) and 1030 Joseph C. Foertsch her husband have hereunto set their hands and seals on the day and year first hereinabove written.

MARY JULIA FOERTSCH. [SEAL.]  
JOSEPH C. FOERTSCH. [SEAL.]

Signed, sealed and delivered in presence of—  
ELKANAH N. WATERS.

DISTRICT OF COLUMBIA, *To wit* :

I, Elkanah N. Waters, a notary public in and for the aforesaid District, hereby certify that Mary Julia Foertsch (formerly Mary Julia Barrett) and Joseph C. Foertsch, her husband, the grantors in and who are personally well known to me as the persons who executed the foregoing and annexed deed, dated December 6th, A. D. 1890, personally appeared before me, in the District aforesaid, and acknowledged said deed to be their act and deed, and the said Mary Julia Foertsch (formerly Mary Julia Barrett), being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this 11th day of December, A. D. 1890.

ELKANAH N. WATERS,  
*Notary Public.* [SEAL.]

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1544, fol. 234 *et seq.*, one of the land records of the District of Columbia.

April 11, 1895.

[SEAL.]

GEO. F. SCHAYER,  
*Dep. Recorder of Deeds.*

1031

*Order Allowing Amendment to Libel.*

Filed Apr. 24, 1895.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT *et al.*

*vs.*

CHARLES G. SMITH and CHARLES G.  
SMITH, JUNIOR.

} No. 379. In Admiralty.

Upon motion of the libellants, by Randall Hagner, their proctor, it is this 24th day of April, A. D. 1895, ordered that libellants be allowed to amend their libel by adding in the 4th paragraph thereto, in the 14th line of said paragraph, after the words "as aforesaid" the following words: "and only on account of and by reason of said negligence and want of care of said Charles G. Smith and Charles G. Smith, Junior, and their agents;" and further by adding at the end of said 4th paragraph of said libel the following words: "that the loss and injuries aforesaid were caused by the said negligence and want of proper care on the part of said Charles G. Smith and Charles G. Smith, Junior, and their agents, and not from any omission or neglect on the part of said vessel, the Ellen Tobin, her owners or master or crew."

By the court:

W. S. COX, J.

1032 *Motion to Limit Time of Respondents to Take Testimony.*

Filed Apr. 25, 1895.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT *et al.*, Libellants,

*vs.*

CHARLES G. SMITH *et al.*, Respondents.

} No. 379. In Admiralty.

And now come here the libellants, by their proctor, Randall Hagner, and move the court to limit the time to ten days in which the respondents, Charles G. Smith and Charles G. Smith, Junior, are required to take testimony in surrebuttal and on their cross-libel.

RANDALL HAGNER,

*Proctor for Libellants and Respondents in the Cross-libel.*

DISTRICT OF COLUMBIA, *set*:

Before me this day personally appeared Randall Hagner, who, being first duly sworn, deposes and says: I served copies of the above motion on Messrs. Nathaniel Wilson and Job Barnard, proctors for Charles G. Smith and Charles G. Smith, Junior, by leaving the same at their respective offices on April 25th, 1895, for April 29th, 1895.

RANDALL HAGNER.

Subscribed and sworn before me this 29th day of April, A. D. 1895.

J. R. YOUNG, *Clerk*,  
By M. A. CLANCY, *Ass't Clerk*.

1033

*Order Limiting Time, &c.*

Filed Apr. 29, 1895.

In the Supreme Court of the District of Columbia, Holding the United States District Court.

CHARLES BURNETT <i>et al.</i>	}	No. 379. In Admiralty.
<i>v.</i>		
CHARLES G. SMITH <i>et al.</i>		

Upon consideration of the motion to limit the time for respondents to take their testimony, filed April 25th, 1894, and it appearing to the court that copies of said motion have been served on the proctors for Charles G. Smith and Charles G. Smith, Junior, on that date, it is by the court, this 29th day of April, A. D. 1895, ordered that the time for said respondents, Charles G. Smith and Charles G. Smith, Junior, to take their testimony in surrebuttal and on their cross-libel is hereby limited to ten days from this date.

W. S. COX, *J.*

1034

*Order Limiting Respondents to 30 Days.*

Filed May 1, 1895.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT <i>et al.</i>	}	In Admiralty. No. 379.
<i>vs.</i>		
CHARLES G. SMITH <i>et al.</i>		

By consent of parties, through their proctors, it is hereby, this 1st day of May, A. D. 1895, ordered that the order of April 29th, 1895, by so modified as to allow said Charles G. Smith and Charles G. Smith, Junior, to take their testimony within thirty days from this date; their testimony to be finally closed within that time.

W. S. COX, *J.*

We consent to the passage of the above order.

NATH'L WILSON,

*For Respondents.*

RANDALL HAGNER,

*For Libellants.*

1035 *Motion to Set Time for Hearing and Argument.*

Filed June 5, 1895.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT *et al.*

*v.*

CHARLES G. SMITH and CHARLES G.  
SMITH, JUNIOR.

} In Admiralty. No. 379.

Before Chief Justice Bingham, holding the admiralty court.

And now come here the libellants, by Randall Hagner, their proctor, and move the court for a hearing of the above-entitled cause and to have a time certain set for such hearing.

RANDALL HAGNER,

*Proctor for Libellants.*

*Order Referring Cause to Justice Cole.*

Filed June 7, 1895.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT *et al.*

*v.*

CHARLES G. SMITH *et al.*

} In Admiralty. No. 379.

1036 Upon consideration of the motion filed herein on the 5th day of June, 1895, it is by the court, this 7th day of June, 1895, by consent of the proctors for the respective parties, ordered that this cause be certified to Mr. Justice Cole, now holding the criminal court, for trial.

E. F. BINGHAM, C. J.

We consent to the above.

NATH'L WILSON,

*For Respondents.*

RANDALL HAGNER,

*For Libellants.*

*Motion to Set Time for Hearing.*

Filed June 8, 1895.

In the Supreme Court of the District of Columbia, Holding the  
District Court.

CHARLES BURNETT *et al.* }  
v. } In Admiralty. No. 379.  
CHARLES G. SMITH *et al.* }

Before his honor Justice Cole.

And now come the libellants, by Randall Hagner, their proctors,  
and move the court to set a time for the hearing of this cause.

RANDALL HAGNER.

*Proctor for Libellants.*

Notice given Messrs. N. Wilson and Job Barnard for Monday,  
10th of June, on Friday, the 7th of June, 1895.

1037

*Testimony before Justice Cole.*

Filed July 6, 1895.

In the Supreme Court of the District of Columbia.

CHARLES G. BURNETT *et al.* }  
vs. } In Admiralty. No. 379.  
CHARLES G. SMITH *et al.* }

Testimony taken before Judge Cole during the argument at the  
hearing of above-entitled cause.

Present: Nathaniel Wilson, Esq., on behalf of respondents, and  
Randall Hagner, Esq., on behalf of libellants, and the witness  
JOHN W. AVERILL, who, being duly sworn, testified as follows:

By Mr. WILSON:

Q. State what your name and occupation is.

A. My name is John W. Averill, and I am employed as inspector  
on the Potomac flats.

Q. How long have you been employed by the Government on  
the Potomac river?

A. I think about 10 years.

Q. Were you there in 1884?

A. Yes, sir.

Q. In what capacity then were you there?

A. About the same position I have now, sir—inspector and over-  
seer.

Q. Inspector and overseer?

A. Yes, sir.

1038 Q. Will you state what you know of the survey that was  
made in 1884 of the Georgetown channel opposite the Gil-  
bert and Hartley wharves?



Mr. HAGNER: I object to that, your honor. This is one thing (indicating map): I want to know what he is going to ask him about this map. That is one thing. Now, we are talking about the map, and I want to know what he is going to ask him about the map, and I object to that question.

Judge COLE: I think that is a proper question.

A. I was employed at that time to take soundings to show the bottom of the river, and these soundings were taken five feet apart and taken with a small rod. It was usually intended to shove the rod down to the rock bottom, and those soundings you see there on the map show the exact depth at those locations at that time.

Q. All the distance out?

A. All the distance out.

By the COURT:

Q. It shows the depth to the rock?

A. To the rock. Part of that might have been to the mud on the bottom; some of the soundings might have been to the mud and small loose rock, but the intention was to shove it down to the solid rock.

Q. The natural rock?

A. The natural rock.

1039 By Mr. WILSON:

Q. The river bed is all rock?

A. The river bed is all rock. In some places it is hard.

By the COURT:

Q. The river bed is all rock?

A. That is, when you get to the natural bed of the river it is all rock.

By Mr. WILSON:

Q. By whom was this map made?

A. I took the soundings and it was made from the soundings. I don't know who was the draftsman at that time, but I think a man named Strew made the map at the office. Before the work of making this map was done the soundings were all examined and checked before put on the map.

Mr. HAGNER: This map was made by some one else, but if he can recall each one of these soundings, all right; let him swear to it; but if he undertakes to swear to what anybody else made——

By the COURT:

Q. Were you present when the map was made?

A. That map was made in the office.

Q. Did you examine and compare it with your record book?

A. No, sir; I didn't do that.

Mr. HAGNER :

Q. Do you know who the man was who prepared it ?

A. I think a man named Strew was the man.

1040 By Mr. WILSON :

Q. Is he here now ?

A. I don't know whether he is in town or not.

By the COURT :

Q. Have you the original sounding book ?

A. I think they are at the office.

Mr. WILSON :

Q. Do you remember how far the soundings actually extended ?

— — —

By the COURT :

Q. How far into the river ?

A. They are five feet apart—120 feet.

Q. Five feet apart each way ?

A. Each way.

Q. Five feet this way and five feet this way (indicating on map) ?

A. Yes, sir.

Mr. WILSON :

Q. These soundings went to the bottom of that river ?

A. Yes, sir.

Q. What do you mean by that "C" written there ?

A. That is to designate "C" rocks. There were a number of rocks we made a survey about and they are designated by "A, B, C" rocks. This line is 60 feet (indicating).

By the COURT :

Q. This line is 60 feet out ?

A. Yes, sir.

1041 Mr. WILSON :

Q. Will you state if, as a matter of fact, in the soundings made by you personally in front of that wharf anywhere or partly in front of Gilbert's wharf you found any rock 5 or 6 feet above the bottom 30 or 35 feet long and 8 or 10 feet wide ?

Mr. HAGNER : I object to that as leading and, secondly, as attempting to change the map. The question has nothing to do with the map.

Mr. WILSON : The question may be a little leading. I will ask what you found in the way of rocks in front of the Hartley or Gilbert wharfs a distance of 60 feet out.

A. Perhaps I could best answer that by saying that map represents it better than I could tell.

The COURT:

Q. Have you any independent recollection about it now, Mr. Averill, aside from that map?

A. No, sir. It was made 10 years ago, and I made a great many soundings since and, of course, I could not remember.

Q. You made records of it as you went along?

A. We did. I didn't sound myself. I am satisfied that is a correct and true map.

By Mr. WILSON:

Q. This was filed in the office of the engineer and has been there ever since?

A. Yes, sir.

1042 Q. Do you know it? Has it been there in the office ever since?

A. Yes, sir.

Q. As part of the archives of the office?

A. Yes, sir.

By the COURT:

Q. Did you ever see it there in the office?

A. Yes, sir.

Q. What use is made of it?

A. It is kept on file, of course, to show the depth of the river and, before there is any work done, to find out what is to do; and after the rocks are removed we sometimes make soundings again to show what is take-out.

Q. Does the Government remove rocks from the bottom of the river?

A. Yes. Those rocks colored here have all been removed to a depth of 15 feet.

By Mr. HAGNER:

Q. The rocks colored red?

A. The rocks colored red.

By Mr. WILSON:

Q. Will you state if there are any other marks on the map except the places colored red that indicate the existence of any rocks?

A. These contour lines, as they are called, represent a certain depth. You notice they are curved around. This is intended to be a 12-foot curve around there and that is a 14-foot curve (indicating).

Q. What does the contour curve represent?

A. They represent the lines.

1043 Q. What, if any, reference have they to the existence or non-existence of rocks?

A. The question of the existence or non-existence of rocks?

Q. Yes. Do they merely show the depth?

A. They show the depth in that place.

Q. Nothing more?

A. They would not show any more than the depth.

By Mr. HAGNER :

Q. The depth of the water ?

A. The depth of the water.

Q. On what ?

A. The depth of the water on the rock.

Q. That shows the depth of the water on the rock ; that is rock ?

A. Yes ; these lines around——

Q. That is rock ?

A. If you will follow these lines, you will see where the water is a certain depth.

Q. That shows 14 foot 6 ? It shows that there is a rock there and the depth of water on that rock is 14 foot 6 ?

A. The depth of water where the lines are drawn.

Q. And you say you sounded till you struck the rock ?

A. Yes.

Q. And that 14 foot 6 is the depth of water on the rock ?

A. On that point.

Q. And inside of the contour lines is rock ?

A. That would be a rock if it was a little higher.

1044 Q. Here is Mr. Gilbert's wharf here (indicating), and here are the contour lines, and you say by that line that there is a rock. Is that right ?

Mr. WILSON : Ask him what it shows.

A. I don't know what you mean by it.

By Mr. WILSON :

Q. Each one of these——

By Mr. HAGNER : You stated, Mr. Averill, in each instance that you took the sounding you shoved the rod down until you got to the bed rock ?

A. Either to the bed rock or loose rock——

Q. To the bed rock ?

Mr. WILSON : Let him answer.

The WITNESS : We used a rod about half or three-quarters of an inch in diameter—an iron rod—and shoved it down as far as we could and until we could not go farther. Usually the rod went to the bed rock and sometimes it had mud or small loose rocks on top.

Q. Would you call a rock 43 feet long a small loose rock ?

A. No.

1045 Q. And from 15 to 19 feet wide by that map. Would you call a rock of that size a small loose rock ?

A. No, sir.

By Mr. WILSON :

Q. Do you mean to say there is any such rock shown there ?

A. Let me see the curve. It is 14 feet, and where those lines are

placed around there is depth of 14 feet all around. There is a place there 14 feet 3 inches. There is not much difference between that line, each side of it.

Q. Do you mean to say that there was under each of these places where the contour was a separate rock of that size?

A. No, sir; it is deeper in there than it is outside (indicating).

By the COURT:

Q. You mean to say this is all rock around there (indicating)?

A. Yes, sir.

Q. And then the water is pretty nearly of an average depth. It varies a little, but it is pretty nearly an average depth within those lines. When you get out in these lines it is a little deeper or not quite so deep (indicating)?

A. Yes, sir; it is a little deeper in there, inside, than it is out.

Q. It is a little deeper in there than it is out here (indicating), but it is rock here and rock here, and there is a rock all around there (indicating), and your intention was to get down to what you call bed rock or natural rock forming the bed of the river at all these places?

A. Yes, sir.

1046 By Mr. WILSON:

Q. And these lines are drawn so as to show a comparatively uniform depth of water?

A. Yes, sir.

Q. What is the difference between the black lines and the red lines?

A. The 12-foot curve is green and the 14-foot curve is red and the 16-foot curve is a deeper red.

By Mr. HAGNER:

Q. And you have already stated that the only stones taken out were where these heavy red splotches are?

A. Yes, sir.

Q. And the innermost one of those is more than 60 feet from the beginning of the map and more than 65 feet from the wharf; is that right?

A. It is a little over 60 feet from the wharf. The wharf is back there.

Q. The nearest rock taken out by the Government is more than 60 feet from the wharf?

A. It is right down here. This would be a little nearer (indicating).

Q. Opposite the Gilbert wharf what would it be?

A. 60 feet exactly.

Q. Opposite Gilbert's and more than 60 feet opposite the Hartley wharf, or what they call Charles G. Smith's wharf?

A. I don't know exactly.

1047 Q. This is the Hartley wharf; this is the Hartley and Leach wharf?

A. I don't know the exact location of the machinery.

Q. You have never known since 1884 of the Government taking out any of those rocks?

A. No, sir; they have not. If they had, I would have known it.

By Mr. WILSON:

Q. From your recollection of the survey made by you personally, will you state what, according to your recollection, was the distance from the inner edge of this rock marked red to the wharf and what rocks of any size there were there?

A. I would hardly like to answer that question. The best way to answer that question is to look at the map. Those soundings are just as the bottom was at that time, taken five feet apart. I cannot remember just what the bottom was at the time I made them. I could give some description, but not enough—

Mr. WILSON: If Mr. Hagner objects to this, I will ask you to look up the notes that were made at the time the survey was made by you.

Mr. HAGNER: If I know where the map was leading, I might let it go in.

Mr. WILSON: I told you what it was for—to demonstrate that there was no such thing within 60 feet of that wharf.

Mr. HAGNER: Well, you have taken a curious way of showing it.

The COURT: I will let it go in. Then you don't object?

Mr. HAGNER: I reserve the usual exception.

(Here follows exhibit marked p. 1048.)

1049

*Decree.*

Filed August 27, 1895.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	}	379, D. C. Docket.
<i>vs.</i>		
CHARLES G. SMITH, SR. and JR.		

and

CHARLES G. SMITH, SR. and JR.,	}	Cross-libel.
<i>vs.</i>		
CHARLES BURNETT <i>et al.</i>		

These causes coming on to be heard upon the libel and answer thereto, the cross-libel and answer thereto, and the evidence taken by both parties to said causes and the arguments of the proctors of the respective parties and having been duly considered by the court, it is, this 27th day of August, 1895, ordered, decreed, and sentenced that the libellants were the owners of the schooner Ellen Tobin at the time of the injury to her complained of in the libel, and that the respondents, Charles G. Smith and Charles G. Smith, Jr., are solely liable for such injury and the damages thereby resulting to the libellants in the original libel, and that the latter are not liable

for any damages in the cross-libel. It is further ordered, decreed, and sentenced that the first of the above-entitled causes be, and it is hereby, referred to James G. Payne, hereby designated a special commissioner for the purpose, with directions to ascertain the amount of damages to which the libellants are entitled, consisting of the value of said vessel immediately prior to the injury, together with the reasonable expenses of raising and removing said vessel and said wreck. The said special commissioner shall consider that the evidence already in the record bearing upon the questions referred to him and such additional evidence as either party may introduce before him and make his report with all reasonable speed.

CHAS. C. COLE,  
*Asso. Justice.*

1051

*Motion to Amend Libel.*

Filed Sep. 26, 1895.

In the Supreme Court of the District of Columbia, Holding the United States District Court for said District.

CHARLES BURNETT *et al.*  
*vs.*

CHARLES G. SMITH and CHARLES G. SMITH, JR.

{ District Court.  
No. 379.

and now come the libellants and move the court to be allowed to amend their libel filed in this cause in a matter of form, namely, adding in the introductory part of said libel, after the words "Ellen Tobin," on the first page of said libel, the following words and figures: "at the time of her injuries hereinafter set forth, except that said Peter J. Connolly was one of said owners, and that he has since said injuries, to wit, in September or October, 1893, departed his life testate and leaving said libellants, Michael Tobin and John Riley, his executors, as the owners of the right to sue for his share of the injuries to said schooner," and by again adding the same words and figures in the latter part of said introductory part of said libel in the 5th line from the last thereof, after the words "Ellen Tobin."

RANDALL HAGNER,  
*Proctor for Libellants.*

Messrs. Nathaniel Wilson and Job Barnard, proctors for respondents.

GENTLEMEN: Please take notice that I shall, on Monday, the 30th of September, A. D. 1895, at 10 o'clock of that day, at the coming in of the court, or as soon thereafter as counsel can be heard, call up the above motion for hearing before Mr. Justice Cole.

RANDALL HAGNER,  
*Proctor for Libellants.*



Served copies of above on Mr. Job Barnard in person on Sept. 26th, at his office, and by leaving copy on same day at Mr. N. Wilson's office.

RANDALL HAGNER.

*Order Allowing Amendment.*

Filed Sep. 30, 1895.

In the Supreme Court of the District of Columbia, Holding the United States District Court for said District.

CHARLES BURNETT <i>et al.</i>	} District Court.
<i>vs.</i>	
CHARLES G. SMITH and CHARLES G. SMITH, JR.	No. 379.

Upon consideration of the motion of the libellants to amend their libel in a matter of form, as filed herein September 26th, 1895, it is, upon the notice to the proctors for respondents, a copy whereof 1053 is filed herewith, ordered that said motion be, and the same is hereby, allowed, and that said libel be amended by adding in the introductory part of said libel, after the words "Ellen Tobin," on the first page of said libel, the following words and figures:

"At the time of her injuries hereinafter set forth, except that said Peter J. Connolly was one of said owners, and that he has, since said injuries, to wit, in September or October, 1893, departed this life testate and leaving said libellants, Michael Tobin and John Riley, his executors, as the owners of the right to sue for his share of the injuries to said schooner,"

and by again adding the same words and figures in the latter part of said introductory part of said libel, in the 5th line from the bottom thereof, after the words "Ellen Tobin."

By the court this 30th day of September, A. D. 1895.

CHAS. C. COLE,  
*Asso. Justice.*

1054

*Report of Special Commissioner.*

Filed Jan. 21, 1896.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	} No. 379. District Court.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

By decree passed on the 27th of August, 1895, this cause was referred to me as a special commissioner, with directions to ascertain and report the amount of damages to which the libellants are entitled, consisting of the value of the vessel Ellen Tobin immediately prior to the injury, together with the reasonable expenses of raising and removing said vessel and cargo, less the reasonable net value of the said wreck. This reference was moved in this office in Oc-

tober, 1895, and after due notice I proceeded to execute the aforementioned order, and return with this report the testimony and exhibits submitted in proof.

The first subject-matter of the reference is the ascertainment of the reasonable value of the said vessel immediately prior to the injury. On this point several classes of evidence have been submitted, that on the part of the libellants being mostly contained in the testimony taken before the examiner. Witnesses were introduced for the purpose of showing their acquaintance with the said vessel approximately near the date of the injury, and expressing their opinion or estimate of her value at about that time. Two of these witnesses were owners of the vessel. On the other hand, in the progress of this reference the respondents have introduced the testimony of a number of witnesses, none of whom saw the 1055 vessel within several years prior to the date of the injury, and who, so far as they testified to estimates of her value, based their opinions upon her description as given in the Record of American and Foreign Shipping, published January 1, 1893, and another marine record of similar character, these records showing the gross and net tonnage of the vessel, her character and class, the year in which she was built, and in a general way the material which entered into her construction, her measurements, and other information relating to the vessel. The latter witnesses have also undertaken to base their estimates of value upon the condition of the market for vessels of the same class as the Ellen Tobin during the year 1893, and upon the sales of vessels more or less similar in size and character during that and the immediately preceding years. The estimates of these witnesses respectively for the libellants and for the respondents differ so largely in amount that it would be difficult to reconcile their opinions.

A few facts bearing upon this question of value are sufficiently established in proof. The vessel was built at Kennebunk Port, Maine, in 1874, and it is testified by one of the owners that she cost to build at that time complete the sum of \$30,000. The vessel was a schooner with a centerboard instead of keel. Her gross tonnage was 435 and her net 414 tons. For several years she had been carrying coal, stone, and freight of a similar character and had not been classed or rated since May, 1890. It is proper to explain here that periodically vessels are examined by surveyors of the Ship- 1056 masters' Association or of the several boards of underwriters, and that the comparative classification of vessels is in three divisions, beginning with A 1 and running down to A 3, A 1 standing for the highest and A 3 for the lowest grade. It appears that vessels not classed or rated in the manner I have stated are not generally insured—that is to say, the risk is not generally taken by underwriters, and when so taken it is at an extrahazardous premium.

The estimates of value placed upon this vessel immediately prior to the injury by the witnesses for the libellant all agree in one amount—that is to say, \$10,000. One or two of these witnesses testify to a somewhat intimate acquaintance with this vessel down to within

one or two years of the date of the injury. The estimates of the witnesses for the respondents vary from \$2,500 to about \$5,000, several of these witnesses stating that in 1893 she would be worth at the rate of \$10 per ton of her registered tonnage.

There is also a considerable amount of proof here tending to show that the deterioration of vessels or depreciation in their value is for some years at the rate of eight per centum per annum, other witnesses testifying that the rate is five per cent., and some that after a given period of a vessel's life this depreciation is about three per cent.

The libellants have produced another class of evidence as tending to show the value of the vessel—that is to say, the net earnings of the boat during the five years preceding the injury. A book of record has been introduced showing the dividends paid to the several owners as being the net profits or earnings of the vessel over and above her running expenses and repairs, and these profits or dividends amount on an average to about twenty per cent. on a capital of \$10,000. Upon this proof it is claimed on behalf of the 1057 libellants that the vessel was of value not less than that sum to the owners. It seems to me that this is not a safe measure of value, depending as it does upon too many conditions other than the intrinsic value of the boat, such as the character and opportunities of the particular trade in which she was engaged and the capacity and industry of her master, managing owner, and agents. There is another fact to be taken into consideration on this point, and that is that the vessel was not insured. In other words, the owners were their own underwriters, and it is admitted by the principal witness for the libellants, being himself one of the libellants and owners, that they would have been obliged to pay at least ten per cent. for her insurance. Not being insured, if the vessel was lost by accident the loss would have been absolute.

One of the most reliable witnesses introduced on the part of the respondents is Captain Martin, a marine surveyor and employed as such for many years by the New York board of underwriters. Leaving aside his general estimate of the fair value of the vessel in August, 1893, he testifies that one rule of depreciation is that the value of a vessel twenty years old is but one-quarter of her value new and ready for sea. The vessel in question was a little over 19 years old at the time of the injury, so that the depreciation in value would be  $\frac{1}{2}$ ths of the  $\frac{1}{4}$ ths depreciation which would occur in the twenty years.

Some testimony has been submitted for the purpose of showing what a vessel of this class could have been built for in and about the year 1893, some witnesses testifying that such a vessel 1058 could have been built for not exceeding \$40 per ton, and one witness, introduced on the part of the respondents, fixing her cost ready for sea at that time at \$18,000, which is a little in excess of \$40 per ton. The libellant Endicott, in his testimony, when questioned upon this point, states that "they (meaning the owners) were negotiating for the building of a vessel of the class of the Ellen Tobin to cost when complete, ready for sea, \$21,000 or \$22,000."

Applying these several facts as a rule for the ascertainment of value, the result would be that in August, 1893, this vessel was worth  $\frac{1}{2}$ ths of  $\frac{3}{4}$ ths of what a new vessel would cost less than that cost. In other words, if the vessel could have been constructed complete for the sum of \$18,000, the Ellen Tobin would have depreciated or was worth less than that amount,  $\frac{3}{8}$ ths. Taking Mr. Endicott's estimate of the cost of a new vessel as \$21,000 and deducting from that  $\frac{5}{8}$ ths, the value of the vessel would seem to be \$6,037.50.

If the estimate of the witness Gilkie, testifying for the respondents, that the cost of construction of such a vessel in 1893 would not exceed \$18,000, be taken, and applying the same rule, the value of the Ellen Tobin would be fixed at \$5,175.

In the conflict of evidence here on the point of value I have adopted this rule as that which seems to be the most safe and fair for all parties, and I report the value of the Ellen Tobin immediately prior to the injury at the round sum of \$6,000, giving the libellants the advantage as between the testimony of Mr. Endicott and Captain Gilkie.

1059 Stating this theory of the ascertainment of value to counsel for the libellants, it is argued that I should allow in addition the cost of certain repairs which were made upon this vessel within a comparatively short time prior to the injury. The average depreciation of value, as testified to by all the witnesses giving evidence upon that point, assumes that the vessel is kept in good condition and repair, and I am bound to assume that such repairs as were put upon her within the year or two prior to her injury were necessary to keep her in good order and condition, and did not really affect the ordinary depreciation in value.

Counsel for the respondents in argument here call attention to what is termed an offer of the libellants to take the sum of \$5,000 for the vessel, and offer that as an item of evidence of her value. It seems that while the vessel was sunk two of the owners, Endicott and Burnett, and the respondent Smith discussed the matter of liability and of the proper proceeding in relation to the removal of the vessel. In the course of one of these discussions a proposition was made by the libellants to take in full satisfaction from Smith the sum of \$10,000. Afterwards they modified this offer, saying they would discount the offer of \$10,000 fifty per cent., he, Smith, to take the vessel as she was—that is, in her sunken and injured condition. Smith asked for time to consider the proposition, and on the following day declined it.

This can hardly be considered an offer to sell the vessel for \$5,000, but must be treated rather as an offer to compromise a dispute or controversy. I therefore have not taken it into consideration in my ascertainment of the value.

1060 The next direction of the order of reference relates to the reasonable expenses of raising and removing the vessel and cargo, less the reasonable net value of the said wreck. The evidence shows that the vessel was loaded with stone at the time of the injury and sunk with that freight; that the libellants solicited and

received bids respectively for raising the vessel and cargo together, and for raising the vessel and cargo separately. The cargo of stone was raised at a cost of \$1,240. The vessel was not raised by the libellants, but was sold at public auction, and bid in by the libellants for the sum of \$25; that they immediately sold her to John B. Lord for the sum of \$100, he undertaking to raise and remove her, and giving bond to secure that undertaking. The libellants, therefore, neither raised the vessel nor incurred or paid any of the cost or expense of raising and removing her. In testifying here the libellant Endicott is asked on page 3 of the testimony whether the amount expended—that is to say, \$1,240—for removing the cargo, and the value of the vessel, consisting of her hull and outfit, minus the \$100 received for her, was or not a reasonable expense, and answers that he considers that \$1,240 expense for taking out the stone reasonable; that the libellants gave the vessel, less \$100, and considered that the expense of raising her, and that it was a reasonable amount.

In answer, therefore, to this direction of the order of reference I have to report that the reasonable cost of raising and removing the cargo was \$1,240; that the libellants incurred no cost or expense in the raising of the vessel, and are to be charged with the sum of \$100 received from Mr. Lord, less the cost of the public sale. In addition to the latter item the libellants are to be charged  
1061 with the amounts received from the sale of the yawl-boat and compasses, etc., as admitted in the testimony.

This report complies with the specific directions of the order of reference, but the libellants make a further claim for expenses incurred by them, an account of which is filed, marked Libellants' Exhibit A, in reference. This account is designated "expenses attending the sinking of the vessel, sale, &c.," and is made up in part of the travelling expenses of owners of the vessel and others coming to Washington to see the wreck and consulting with relation, to wit, expenses of a survey, expenses of owners coming to Washington to attend the advertised sale of the wreck, expenses of watchman, and of the captain of the schooner, and the expenses of libellants and witnesses coming to Washington to testify, including sums of money paid to some of these witnesses for their attendance. Some of these expenses were incurred by the owners of the vessel in the efforts to decide upon the course they should pursue in regard to raising the vessel and cargo, but are not immediately connected with the cost of raising either the vessel or her freight. I therefore do not feel justified in allowing any part of this account.

The account first filed by the libellants, marked Exhibit A, was afterwards substituted by a corrected or condensed statement marked "Exhibit Endicott Last." Two of the items contained in the account, the expenses of the sale of the wreck and \$40 paid for handling the stone, are included in the allowance already made, as set forth in this report.

In the schedule herewith I have stated the several amounts as directed by the order of reference—that is, the reasonable value  
1062 of the vessel, the cost of raising the cargo, and the sum received from the sale of the wreck, less the costs of the public

sale, and the amount received from the sale of the boat, compasses, lamps, etc.

JAS. G. PAYNE,  
*Special Commissioner.*

Fees.....	60 00
Test.....	70 00
Do.....	5 00

\$135 00

Paid by libellants.

JAS. G. PAYNE, *Auditor.*

#### SCHEDULE A.

##### *Statement of Damages as Specified in Decree.*

Reasonable value of the schooner Ellen Tobin immediately prior to the injury .....	\$6,000 00
Cost of raising cargo.....	1,240 00

\$7,240 00

Less amount received from John B.

Lord for sale of wreck as it lay

sunk ..... \$100

Less costs of public sale..... 28 12

\$71 88

Proceeds of sale of yawl-boat, lamps, etc. .... 105 00

176 88

\$7,063 12

JAS. G. PAYNE, *Auditor.*

1063

##### *Vouchers with Report of Auditor.*

. D. H. Naramore, 321 King St., Alexandria, Va.

Received of Randall Hagner, 406 5th St. N. W., two dollars for one photograph. Whole amount schooner Ellen Tobin.

D. H. NARAMORE.

##### *Additional Tobin Expenses.*

Paid marshal for summons of Godfrey.....	50
" " " " Taylor, of the Harlow.....	50
" " " " Davis, " " .....	50
" for trip up the river.....	1 50
" " " something to eat for self & man .....	60
" man afterwards for information about pole.....	50
" in Georgetown .....	2 00
" to Taylor.....	2 00
" to Davis.....	2 00
Ap'l 25, paid foreman at Agnew's.....	2 00





1893.

Dec. 19.	To check, C. H. Wordell, surg.....	3 50
	To check, John Hankins.....	14 00
28.	To check, J. S. Risley, surg.....	1 75
	To cash, postage & register.....	48
	To cash, James H. O'Neill, surg.....	3 70

*Schooner Ellen Tobin—Expenses Attending Her Sinking, Sale, &c.*

1893.

Aug. 8 to 14.	Telegram that she was sunk.....	75
	Expenses of Endicott & Chas. Burnett coming to Washington to inspect the wreck.....	40 80
" 19.	Expenses Captain Davy & Endicott coming to Washington to consult about wreck and see to raising it.	28 86
Oct. 31 to	Expenses survey, Gokey, Kenzel	\$20 00
Nov. 4.	Park Agnew, and Endicott.	52 70
		<hr/>
		72 70
Nov. 4.	Henry Wolter, diving expert from Philadelphia, to examine as to getting stone out.....	7 50
Nov. 6.	Circulars advertising sale.....	2 00
" 14.	Attending sale.....	20 75
" "	Watchman on vessel....	3 00
1066		
Nov. 22.	Mate and cook for watching vessel. Captain Hankins' board in Georgetown and expenses travelling... Hankins, in addition, \$50 per month for 3½ months, from Aug. 6 to Nov. 16... ..	112 33 V. 166 75 V. 167 33 V.
Nov. 29.	C. M. Bell, photographer..... Ratcliff, Darr & Co., expenses of sale.....	10 00 V. 28 12 V.
	H. W. Brewer (plat & survey)....	50 00 V.
Dec. 5.	Baltimore Wrecking Co., (examining rock).....	40 00 V.
	Chas. G. Smith & Son, handling stone.....	40 00 V.
" 15.	Surrogate O'Neal.....	3 10 V.
	" ".....	3 70 V.
1894.	" ".....	3 75 V.
Feb. 7.	Wardell.....	3 50 V.
Dec. 14, '93.	O'Neal.....	2 45 V.
	Risby.....	2 75 V.

1894.			
Jan.	8, '94.	Bringing Hankins, cook, & Endicott.....	52 70
		Burnett & Vreeland (coming to Wash'n).....	52 20
		John Hankins.....	35 90 V.
		Mate Twiford, coming to Washington.....	8 70 V.
Feb.	6.	William H. Kenzel & W. Gokey, railroad fare and board, hotel...	43 50
	26.	John Hankins.....	44 20
		Park Agnew for testifying.....	20 00
1894.			
M'ch	2.	Chas. Burnett & Fred. Davy.....	39 25 V.
	23.	Endicott and Capt. Coly, testifying.	40 80 30 80
May	16.	Bringing two sailors to Washington to testify, including shipping master, for finding them, and railroad fare.....	10 00 V.
			Part
Jun-	18.	A. J. Cole, \$25 & expenses, testifying and coming to Washington.	65 40 voucher
			63 63
1894.			
Nov.	17.	Endicott coming on to Washington.	15 25
1895.			
Feb.	14.	Baltimore Wrecking Co .....	40 00 V.
	26.	Broom, diver.....	61 00
		John Hankins, with diver.....	19 70 V.
1067			
Feb.	26.	Endicott coming to Washington...	11 70
Ap'l	20.	C. J. Fox, inspector, witness.....	27 50 V.
		John A. Curtis, " .....	27 50 V.
1894.			
Jan.	11.	Nicholas Harp, diver .....	12 50 V.
	14.	" " coming back.....	12 50
	20.	William E. Bell, witness.....	5 00 V.
1895.			
May	27.	C. M. Bell, photographer.....	8 00 V.
		Stephen Smith, witness from Richmond.....	17 00 V.
		Thomas Bury, from Alex.....	3 00 V.
		Narramore, photographer.....	4 25 V.
		Items of Hagner for witnesses....	13 90
		E. G. Lord, witness.....	1 25 V.

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\$1,533 27

WEST WASHINGTON, D. C., *Sept. 5th*, 1893.

Received from John Hankins the sum of thirty-seven dollars and thirty-three cents (\$37.33) in full to date for watching schr. Ellen Tobin twenty-eight nights, at \$1.33½ per night.

WILLIAM BORKLY.

GEORGETOWN, D. C., *Sept. 14th*, 1893.

Received from owners of schr. Ellen Tobin by the hands of John Hankins the sum of fifty-three dollars in full to date for watching schr. Ellen Tobin while sunk.

MAJOR D. TWIFORD.

GEORGETOWN, D. C., *Sept. 14*, 1893.

Received from owners of schooner Ellen Tobin by the hands of John Hankins the sum of twenty-two dollars in full to date for M. D. Twiford's board while watching schr. Ellen Tobin.

MARY E. SULLIVAN.

1068

ALEX., VA., *Nov. 5*, 1893.

Schr. Ellen Tobin and owners to Park Agnew.

For services in holding survey on vessel in Georgetown... \$20 00

Rec'd payment,

PARK AGNEW.

Thanks.

Mr. Schr. Ellen Tobin and owners to J. H. Pilson, Dr.

50 sale bills..... 2 00

Received payment,

J. H. PILSON.

GEORGETOWN, D. C., *Nov. 14*, '93.

Owners of schooner Ellen Tobin to H. W. Brewer, Dr.

Survey & plat of schooner Ellen Tobin, wharf and property  
lines..... \$50 00

Received payment,

H. W. BREWER.

WASHINGTON, D. C., *Nov. 15*, '93.

Rec'd from Chas. G. Endicott three no 100 doll's for services as watchman on board schr. Ellen Tobin.

SAMUEL HARPER.

1069

JERSEY CITY, N. J., *Nov. 22*, 1893.

Capt. John Hankins in ac. Schr. Ellen Tobin.

Mate & cook..... 112 33

Capt.'s board, 90.90, & expenses, 75.85..... 166 75

3½ months' wages, 50.00..... 279 08

166 75

445 83

Cash .....	100 00
Yawl-boat .....	75
Cash .....	50
Furniture.....	30
	<hr/>
	255 00

190 83

Received payment,

JOHN HANKINS.

WASHINGTON, D. C., *Nov. 30, 1893.*

Mr. Randall Hagner to C. M. Bell, Dr.

To 4 photo's, 2 neg's (schooner Tobin) ..... 10 00

Received payment,

C. M. BELL.

1070

BALTIMORE, *Nov. 31, 1893.*Schr. Alice Tobin and owners to Baltimore Wrecking Company,  
Dr.To examining rock by diver when Alice Tobin was sunk,  
as per agreement... .. \$40 00

Received payment,

LOUIS E. BROOM, *Sup't,*  
Per M. B.JERSEY CITY, N. J., *Dec. 14, 1893.*Estate of Harriet D. Burnett, dec'd, to James H. O'Neil, surrogate,  
Dr.

Certified copy of will..... \$1 25

Extra certificate..... 1 20

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2 45

Rec. pay't,

JAMES H. O'NEIL.

MAY'S LANDING, N. J., *Dec. 16, '93.*

Schr. Ellen Tobin to J. S. Risley, surrogate, Dr.

To certified copy will of Thos. D. Endicott..... \$1 75

B. S. RISLEY, *Surrogate.*

1071

FORMS RIVER, N. J., *Dec. 18, 1893.*

Schooner Ellen Tobin to Charles H. Wardell, Dr.

1893.

Dec. 18. To certified copy of Christian D. Emson will... .. \$3 50

Dec. 20, '93, received payment.

C. H. WARDELL, *Surrogate.*

BARNEGAT, N. J., *Dec. 18, 1893.*

Schooner Ellen Tobin and owners to John Hankins, Dr.

Nov. 27.	To ticket from Barnegat to Phil. and return.....	\$2 40
	“ ticket from Phil. to Washington and return ..	6 00
29.	“ notary public fee.....	50
	“ boat and man to sound rock.....	35
	“ other expenses. ....	4 75

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\$14 00

Received payment,

JOHN HANKINS.

JERSEY CITY, N. J., *Dec. 18, 1893.*

Schooner Ellen Tobin and owners to James H. O'Neil, surrogate, Dr.

Certified copy of will of Michael S. Allison, dec'd.....	2 50
1 extra certificate.....	1 20

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3 70

Received pay't Dec. 29, '93,

JAMES H. O'NEIL.

1072

WASHINGTON, *Jan. 11th, '94.*

Received of Capt. Hankins for owners schr. Ellen Tobin for rendering service in trial of said schr. :

Fare from Balto. to Wash. and return... ..	4 00
(4) meal. ....	1 50
Nicholas S. Harp.....	2 00
Charles J. Pearson .....	5 00

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12 50

Received payment,

NICHOLAS S. HARP.

BARNEGAT, N. J., *Jan. 13, 1894.*

Schooner Ellen Tobin and owners to John Hankins, Dr.

To fare from Barnegat to Washington and return.....	\$8 40
“ fare from Washington to Balto. and return.....	2 00
“ expenses in Washington while giving testimony.....	13 00

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\$23 40

Received payment,

JOHN HANKINS.

1073

WASHINGTON, Jan. 14, '94.

Received of Mr. R. Hagner for service rendered in trial of  
schooner Ellen Tobin (coming back, giving testimony). \$12 50

Received payment,

NICHOLAS S. HARP.  
CHARLES J. PIERSON,  
*Submarine Diver.*

WASHINGTON, D. C., Jan. 20, 1894.

Received of Randall Hagner five dollars, my witness fee, and for  
employing another party to look after my business while testifying  
in Ellen Tobin case.

WM. E. BELL.

Received of Randall Hagner \$2.00, witness fee in Tobin case.  
GEORGE W. BELL.

WASHINGTON, D. C., Feb. 3d, 1894.

Schooner Ellen Tobin and owners to Major D. Twiford, Dr.

Jan. 31.	To fare from Baltimore to Washington & return...	\$2 00
Feb. 3.	" " " " " " ...	2 00
	To two days' time, at \$2 per day, to give testimony.	4 00
	2 meals, at 35 cts. ....	70
		<hr/>
		\$8 70

Received payment,

MAJOR D. TWIFORD.

1074

JERSEY CITY, N. J., Feb'y 7th, 1894.

Estate of Michael S. Allison, dec'd, to James H. O'Neil, surro-  
gate, Dr.

Exemplified copy of will proceedings ..... \$3 10

Rec'd pay't Feb. 13, '94,

JAMES H. O'NEIL.

JERSEY CITY, N. J., Feb'y 16, 1894.

Estate of Harriet E. Burnett, dec'd, to James H. O'Neil, surro-  
gate, Dr.

Exemplified copy of proceeding on will .....	\$2 75
To bill rendered .....	1 00
	<hr/>
	\$3 75

Rec'd pay't Feb. 13, '94,

JAMES H. O'NEIL.

BARNEGAT, N. J., *Feb.* 13, '94.

Schooner Ellen — and owners to John Hankins, Dr.

To fare from Barnegat to Washington and return, to attend lawsuit. . . . .	\$8 40
“ fare from Washington to Baltimore & return . . . . .	2 00
“ expenses while in Washington. . . . .	23 60
	<hr/>
	\$34 00

Received payment,

JOHN HANKINS.

1075

MAYS LANDING, *February* 23, 1894.

Schr. Ellen Tobin to J. S. Risley, Dr.

To exemplification to copy will of Thos. D. Endicott, dec'd. \$1 00

Rec'd payment,

J. S. RISLEY, *Surrogate.*FORMS RIVER, N. J., *Feb'y* 26, 1894.

Endicott &amp; Co., Jersey City, N. J., to Charles H. Wardell, Dr.

Feb'y 23, 1894. To certificate of judge &amp; clerk of the orphans' court . . . . . 75

Received payment,

CHARLES H. WARDELL,  
Per T. T. W.

Thanks for promptness.

JERSEY CITY, *May* 17, 1894.

Rec'd from Endicott &amp; Co. ten dollars in full for services and all demands in coming to Washington, D. C., to give evidence in schr. Ellen Tobin case.

10.00.

A. STIVENS.

10.00.

MARTIN THOMSON.

JERSEY CITY, N. J., *Dec.* 5, '94.

Rec'd from Messrs. Endicott &amp; Co. three no 100 —, same being in full for services in obtaining two sailors for giving their evidence in lawsuit schr. Ellen Tobin.

3.00.

WILLIAM VAN CLEAF.

1076

NEW YORK, *May* 14, 1894.

Capt. Willian Vancleaf will please pay Christ. Deming five dollars for board, express, supplies, etc., to be paid when due me for services as — on board the — fore bo-rde, and to be charged to my account at the end of the voyage or when duly discharged from said vessel.

6 daïs after date.

WILLIAM VAN CLEAF.

Rec'd payment,

MARTIN THOMSON.



BALTIMORE, *Feb. 1, 1895.*

Mr. Charles G. Endicott &amp; Co. to Baltimore Wrecking Company, Dr.

To diver examining rock for Randall Hagner in reference  
to schr. Ellen Tobin (Georgetown) ..... \$40 00

Received payment,

LOUIS E. BROOM, *Sup't,*  
Per M. A. B.

JERSEY CITY, *Feb'y 26, '95.*

Schr. Ellen Tobin to John Hankins, Dr.

Fare Barnegat to Phila. and return..... 2 40  
" Phila. to Washington and return..... 6 00  
" Washington to Baltimore and return..... 2 00  
Hotel bill, &c..... 9 30

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\$19 70

Rec'd paym't,

JOHN HANKINS.

1077

JERSEY CITY, 3, 2, 1894.

Schr. Ellen Tobin &amp; owners to Chas. Burnett, Dr.

To cash expense to Wash., R. R. fare & board.... 39 25

CHAS. BURNETT.

WASHINGTON, D. C., *Mar. 27, 1895.*

Mr. R. Hagner to C. M. Bell, Dr.

To 2 views, 8 x 10..... \$8 00

May 16, '95, paid.

C. M. BELL.  
DODGE.

WASHINGTON, D. C., *Ap'l 4th, 1895.*

Received of Randall Hagner \$1.25 in full of witness fee in Ellen  
Tobin case.

E. G. LORD,  
603 9th S. W.

WASHINGTON, D. C., *Ap'l 4, '95.*

Received of Randall Hagner seventeen dollars for expense as  
witness in Ellen Tobin case.

STEPHEN SMITH.

Received of Randall Hagner, same date, three dollars & two for  
meals as witness in Ellen Tobin.

THOMAS BERRY.

1078

MERRITT'S WRECKING ORGANIZATION,  
NORFOLK, VA., April 6th, 1894.

Mr. Charles G. Endicott.

DEAR SIR: Yours of the 5th at hand, with enclosed check for \$10 for services of Capt. Coley, ac. Ellen Tobin. Many thanks.

Yours truly,

H. SEYMOUR.

ENDICOTT & CO., JERSEY CITY, N. J., April 20, 1895.

Rec'd from Mess. Endicott & Co. twenty-seven  $\frac{50}{100}$  dollars, same being expenses and witness fee in going to Washington, D. C., to testify in case Schr. Ellen Tobin *versus* C. G. Smith & Son.

27.50.

CH'S J. FOX.

ENDICOTT & CO., JERSEY CITY, N. J., Ap'l 20, 1895.

Rec'd from Mess. Endicott & Co. twenty-seven  $\frac{50}{100}$  dollars, same being expenses and witness fees in going to Washington, D. C., to testify in case Schr. Ellen Tobin *versus* C. G. Smith & Son.

27.50.

JNO. A. CURTIS.

1079

*Testimony Taken Before the Auditor.*

Filed Jan. 21, 1896.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT *et al.* }

*vs.*

CHARLES G. SMITH *et al.* }

Admiralty. No. 379, D. C. Doc. No. 1.

OCTOBER 8, 1895—11 o'clock a. m.

Hearing pursuant to notice.

Present: Mr. Randall Hagner for the libellants and Messrs. Nathaniel Wilson and Job Barnard for the respondents.

CHARLES G. ENDICOTT, one of the libellants, having been first duly sworn, testified as follows:

By Mr. HAGNER:

Q. You are one of the libellants and have testified before in this case?

A. Yes, sir.

Q. Mr. Endicott, what did the Ellen Tobin originally cost?

A. She cost about \$30,000. I cannot give you the exact cost.

Q. Well, why?

A. Captain Burnett, under whose supervision the contract was made, had the papers in that matter. I asked him for them—he was very old—and he said he had destroyed them. He had gone through his papers of different kinds and character, and what he thought was not needed he had torn up years ago. She was contracted for at the rate of \$27,000, with some extras—the patent centerboard was to be extra, the inspection was to be extra, the supervision of the vessel extra, and the man who designed and modeled the vessel was to be paid extra. The cost

was very little short of \$30,000. She was contracted for at a very low time, and Mr. Thompson—that Thompson of Kennebunk Port, Maine—with whom the contract was made, was to build the vessel in six months, but he did not get her out until after two years.

Q. Mr. Endicott, from your experience and from your business, which you have stated in the testimony in this case, can you tell the value of such a vessel as the Ellen Tobin before she was wrecked?

A. I think so.

Q. You have already stated her value immediately preceding her injury at Smith's dock?

A. Yes; at \$10,000.

Q. What was the Ellen Tobin worth, Mr. Endicott, when lying sunk at Smith's dock after the injury?

A. I did not consider her worth anything as she lay sunk on the bottom. The expense of removing her was more than she was worth after removing her.

Q. What was she worth to pick her; in other words, what was her outfit or junk worth as she lay there?

A. We had estimates made at the time, and the lowest they would strip her for, I think, was about \$300.

1081 Q. You have already testified that some Baltimore man wanted to buy her.

A. He offered me three hundred dollars for the outfit, yes; when I asked him for the money he could not produce it.

Mr. HAGNER: That was on page 353 of the original testimony.

Q. That value of \$300 was for the junk?

A. Sails, blocks, rigging, etc.

Q. Anchor chains and cordage?

A. Yes.

Q. What, if anything, did Mr. John B. Lord ask to raise the vessel?

A. He told me he would raise her, after the stone was out, for \$1,500.

Q. And that was after the stone had been pumped out?

A. Yes, sir.

Q. I will have to ask you, Mr. Endicott, what were the reasonable expenses of raising and removing the vessel and cargo, whether the amount that was expended—that is, the \$1,240—for removing the cargo and the value of the vessel in addition, the entire vessel, consisting of her hull and outfit, minus the \$100 received for her—whether that was or not a reasonable expense for raising her and taking out the stone.

A. Your question is a little mixed. If you will let me answer in my own way—in the first place, I consider \$1,240 expense for taking out the stone very reasonable. We have the evidence there to show that he had bids from different parties, and we consulted with a large number of wreckers, and the bids ranged from \$5,500 to  
1082 \$8,000. They asked us to take it out—to come from a distance and take it out. I consider the \$1,240 a very reason-

able amount to take out the stone. In regard to raising the vessel, the Merritt Wrecking Co. said they would raise her for from \$2,500 to \$3,000 after the stone was out.

Q. Now state what would be the reasonable expense of raising that vessel.

A. We gave the vessel, less \$100. I consider that <sup>the</sup> *that* expense of raising her, and I consider it a reasonable amount, because she was not worth it.

Q. Now, to supplement that, what was the lowest figure that you had to raise her after the stone had been gotten out?

A. Mr. Lord's offer of \$1,500.

Q. What was the reasonable net value of the vessel, Mr. Endicott?

A. As she laid there?

Q. Yes.

A. On the rock?

Q. Yes.

A. I did not consider her of any value at all.

Q. Was it a plus or minus value?

A. I should think minus, although it did not prove so; she proved to be worth \$100.

Cross-examination.

By Mr. WILSON:

Q. Mr. Endicott, when and where was the Ellen Tobin built?

A. Built in Kennebunk Port, Maine; 1874, I think, she came off.

Q. You were one of the original owners?

A. Yes, sir.

1083 Q. I think you have stated in the testimony already taken when she was last repaired?

A. Yes.

Q. The year before she sunk, was it not?

A. Yes, sir; the summer before.

Q. Was she repaired the year before that?

A. Yes, sir; she was repaired every year. We took her to a dry dock every year, usually, to make repairs, along in August or September.

Q. At the time she sunk was she insured?

A. No, sir.

Q. Had any application been made for her insurance that you are aware of?

A. I know of no insurance on the vessel whatever; none to my knowledge.

Q. Would you have known if there had been any insurance?

A. I would be apt to know it.

Q. In what relation did you stand to the vessel?

A. Managing owner—settling owner. An individual owner might insure his share.

Q. What at that time would have been the rate of insurance on a vessel of the class of the Tobin?

A. I presume about 10 per cent.—it runs from 8 to 12 per cent. Those are the rates we ordinarily pay.

Q. Then on a value of \$10,000 it would have been \$1,000?

A. Yes, sir.

1084 Q. Do you know what the net earnings of the Tobin were for the year previous to her loss?

A. I submitted in this testimony her earnings for the last five years.

Q. That is, without reference to the insurance?

A. That is, without reference to the insurance; yes, sir.

Q. Was she uninsured all that time?

A. So far as I know. I am not aware of any insurance that was on the vessel during these five years.

Q. At the time the Ellen Tobin was lost what was the general state of the market in regard to the value of vessels of this character?

A. It was a fair market for vessels at that time.

Q. Do you know of any vessel of the class of the Ellen Tobin being sold at that time?

A. No; I do not call to mind any vessel.

Q. Were you largely interested in vessels?

A. Yes, sir.

Q. How many were you interested in?

A. I am interested in about 58 or 60 now.

Q. At that time?

A. At that time, I think, about 62 or 63.

Q. You do not know of any vessels of the class of the Tobin having been bought or sold that summer?

1085 Mr. HAGNER: I object to that question for the reason that it is this particular vessel that we want to value, and the decisions are all to that effect that we should have to follow and not with some vessel that may be like her.

The objection was overruled.

A. No, sir.

Q. Were vessels of the tonnage and class of the Tobin being built in the summer of that year in which she was destroyed? Was she not rather out of date?

A. No; of late years—the last four or five years—they had been building a larger class of vessels, adapted to certain lines of trade.

Q. They do not build any new vessels of that kind?

A. Yes, sir; one is to be launched this week very nearly her size—within 40 to 60 tons.

Q. Where is she being built?

A. At Bath.

Q. What will she cost?

A. No; she is smaller. We were negotiating for another about her class to cost twenty-one or twenty-two thousand dollars. The one that is going to be launched this week is considerably smaller and will cost less than that.

Q. How much less?

A. She will cost \$16,000, probably \$17,000, when completed—between sixteen and seventeen thousand.

Q. You say the Tobin was worth about \$10,000?

A. Yes, sir.

1086 Q. How do you get at that value? On what do you base your estimate?

A. Upon the general condition the vessel was in and upon her earning capacity.

Q. And not from any offer that you had or from the sale of any vessel of like character?

A. No, sir.

Q. Your estimate was based on her earning capacity?

A. Yes, sir.

Q. How did you arrive at her earning capacity, and what proportion is there between the earning capacity and value—how do you get at it?

A. Well, that vessel for five years paid fully \$2,000 a year clear of all bills and running expenses, which was a good profit. She was a sound vessel, in good condition, and I think that she would earn that much today if she was afloat. We could get very nearly that out of her today if afloat.

Q. I suppose there is some recognized allowance for the depreciation in the value of vessels. What is the allowance for the depreciation in the value of vessels?

A. Well, on a new vessel we reckon about 8 per cent., but a vessel as she gets older will run along for a number of years with very little depreciation, as we are constantly making repairs that keeps them of about the same value.

Q. If you take the cost of insurance and the 8 per cent. depreciation that would very nearly equal what she earned, 20 per cent., would it not?

1087 A. Yes, sir; but that depreciation did not continue.

Q. I understand you to say that you actually paid out \$1,240?

A. We paid Lord \$1,200 and paid Smith \$40, I believe.

Q. Then you sold her as she lay?

A. Yes, sir.

Q. And you sold for \$100 to Mr. Lord?

A. Yes, sir. He gave a bond that he would remove her.

Q. He gave a bond with the condition that he would remove her?

A. Yes, sir.

Q. In addition to that, did you realize any other money from the sale of furniture or any part of the vessel?

A. Yes, sir. I think there was \$30 for lamps and fixtures and \$75 for a yawl-boat.

Q. Well, were her sails worth nothing? What were they worth as she stood there? You spoke of the value of the junk or you were offered \$300 for the junk.

A. The way I arrived at that was, before I came on here that day to the sale I made a rough estimate what I thought things would bring if sold, less the expense which would be incurred. I was told

that they would have to be taken away from here, as they could not be sold here to advantage, and I did not consider it, including the spars, rigging, and everything, worth over three hundred or three hundred and fifty dollars at the outside.

Q. How about the compasses?

A. The compass, I think, and lamps were in the \$30; that is my impression. I do not know exactly. The captain gathered those together and sold them. I think they were included—in fact, I know they were.

1088 Q. Then you got \$100 and \$30 and \$75?

A. Yes, sir.

Q. I have forgotten now what date the vessel sunk.

A. On the 6th of August, 1893.

Q. She laid there until November, what date?

A. The 23rd.

By Mr. HAGNER:

Q. Mr. Endicott, just state what this paper is (handing witness paper).

A. This is a statement of the moneys paid out in connection with the sinking of this vessel.

Q. What is this item No. 1, telegram, for?

A. That was a telegram from the captain telling me the vessel was sunk and to come on. The second item is the expense of myself and Mr. Burnett coming to Washington to inspect the wreck and see what ought to be done with it; I actually spent that money; I have not the voucher for it, but I expended the money.

Q. Now, the next item is that of the 19th of August, 1894, "expenses of Captain Davy & Endicott coming to Washington," \$28.86; have you a voucher for that?

A. No; that was railroad fare and hotel bills.

Q. Was it necessary for you to come then at that time?

A. That is the time that we were making arrangements to see about getting the cargo out and raising the wreck.

Q. The fourth item is expenses of survey; just state what the \$72.70 consists of.

A. There was \$20 of that paid to Park Agnew, for which I have a voucher. The rest is railroad fares and hotel bills.

1089 Q. And did Mr. Gokey and Mr. Henzel charge you anything for that?

A. Simply their expenses.

Q. Now, the next item, No. 5, "Henry Walter, diving expert from Philadelphia." Was that a necessary item, and why?

A. I consulted with Mr. Walter about the getting of the stone out of the vessel. He agreed to come here and look at the situation and give me an estimate. If he got the job he was not to make any charge; if he did not, I was to pay his fare back and forth and expenses. He was not willing to make any bid on the raising, and I paid his expenses.

Q. Item No. 8, "watchman on vessel, 3 00;" was that a necessary expense?



A. That was after we discharged the mate and others; watched two or three days.

Q. Now, the items 9 and 10; were they necessary expenses?

A. I think so. They were for watching the vessel day and night until we made some disposal of her.

Q. The item No. 11, \$167.33; is that a proper expense?

A. That was the captain's board and expenses in Georgetown.

Q. And that was still while the vessel was sunk and being watched?

A. Yes, sir.

Q. Now the 15th item; that was for examining the rock. You paid that and have a voucher for it?

A. Yes, sir.

Q. That was for a diver to go down and examine the rock?

A. Yes, after the vessel was moved.

Q. Then the 16th item, "Chas. G. Smith & Son, \$40." That was for removing stone to where it was placed on the dock, after taking it off the vessel?

A. Yes, sir.

1090 Q. Here are five or six little items, consisting of small sums—three and two dollars, and so on—surrogate's items. Those were for copies of the will of these various dates, which were put in evidence?

A. Yes, sir; some certified copies of the will; some are just certified lists of the executors.

Q. The 23rd item, "bring Hankins, cook, \$52.75"?

A. That is, bring Capt. Hankins and the cook here to testify.

Q. Now, the next item is 24. That is the same thing?

A. The 24th item is the same—for bringing Vreeland and Burnett here to testify. I find I am mistaken in answer to 24th item. Burnett and Vreeland came here to see about removing stone from wreck and raising vessel.

Q. The 27th item?

A. That is from Mr. Kenzel and Gokey coming here to testify in the case.

Q. The 29th item?

A. That is \$20 for testifying. I paid that myself.

Q. The 30th item?

A. That is for Charles Burnett and Frederick Davy coming here to testify.

Q. And the 31st?

A. That is for myself and Capt. Coly coming here.

Q. The 32nd?

A. My partner, Mr. Hammond, brought two sailors on here. Part of that you have a bill for, paying them for coming; but the railroad fare included in this amount is not in the voucher.

Q. Then the item No. 33?

1091 A. Is Capt. Cole's expense of testifying, \$25 paid him and his expenses.

Q. He had to come a long way?

A. Yes.

Q. Then No. 35?

A. That was expense of my coming here.

Q. No. 36?

A. Baltimore Wrecking Co.; that was divers examining the rock.

Q. No. 37?

A. \$61; that is the time they examined the rock.

Q. No. 38?

A. Is for Capt. Hankins coming at the same time with the divers, \$19.70

Q. No. 39?

A. I came to Washington to have some witnesses examined; that is simply railroad fare.

Q. They were the witnesses and you paid them to come on from Richmond?

A. Yes, sir. Nicholas Hart, \$12.50; you have a bill for that. William E. Bell, witness; you have that bill. C. M. Bell, photographer; you have that bill. Stephen Smith; that is a witness that came from Richmond, \$17. Thomas Barry, from Alexandria; you have that bill. Narramore, photographs, \$4.25; you have that bill. E. G. Lord, witness, \$1.25; you have that bill. Then you have a bill in your own name, Mr. Haguer, for \$13.90 for various witnesses.

1092 Cross-examination.

By Mr. WILSON:

Q. Will you check on this list the items you have vouchers for (handing witness paper)?

A. Those I have marked "V" I have vouchers for.

Q. There is an item here of \$20.75 for attending sale; what does that mean?

A. That is my expenses in coming here the day before the sale to attend the sale and dispose of the schooner to Mr. Lord.

Q. Items 8, 9, 10, and 11 relate to charges for watchman and money paid to Hankins; how much did you pay for watchman for watching the vessel?

A. One hundred and twelve dollars and some cents; we paid that to the mate and cook.

Q. For watching the vessel?

A. Yes, sir.

Q. What did you pay Mr. Hankins \$50 a month for?

A. He was here attending to this matter. He was over *he* Baltimore several times. He was down to Norfolk seeing about getting the stone out and wreck raised, &c.

Q. Did you charge for his board besides?

A. Yes, sir; that is just what I paid him.

MR. WILSON: I want to make an objection to each of the items here as inadmissible against us and not included in the order of reference.

Adjourned subject to notice.

1093

WEDNESDAY, *October 16, 1895*—10 o'clock a. m.

Hearing upon the application by the libellant- to limit the time for taking testimony on the part of the respondent- in this reference.

Present: Mr. Hagner for the libellant-, Mr. Nathaniel Wilson for the respondent-.

After hearing counsel the case is set down for Tuesday, the 22nd instant, at 2 o'clock p. m., for proceeding on the part of the respondent-.

TUESDAY, *October 22, 1895*—2 o'clock p. m.

Hearing pursuant to adjournment.

Present: Messrs. Hagner, Wilson, and Barnard, of counsel, and Mr. Endicott.

Counsel for the respondent- ask for a postponement or adjournment of the hearing until Tuesday, November 5, 1895, at 10 o'clock a. m., in order to present witnesses residing beyond this jurisdiction.

Mr. WILSON: While we are here I would like to ask Mr. Endicott one or two questions.

CHARLES G. ENDICOTT recalled.

By Mr. WILSON:

Q. What knowledge have you of the last shares or interests in the Tobin having been sold, and at what price were they sold?

A. I do not think there was any shares sold within, probably, three years of the loss of the vessel. I know that there was  
1094 one share sold at auction about that time. I could not give you the price now.

Q. I wish you would ascertain.

A. All right; I will ascertain.

Adjourned.

TUESDAY, *November 5, 1895*—10 a. m.

Hearing pursuant to notice.

Present: Messrs. Hagner and Wilson.

MICHAEL W. CROWELL, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Please state your residence and occupation.

A. Residence, Baltimore; marine surveyor, adjuster, and appraiser.

Q. For whom are you adjuster and appraiser?

A. Western Assurance Company of Toronto, Canada.

Q. How long have you been engaged in inspecting vessels?

A. Twenty-three years, sir.

Q. And in what capacity?

A. As marine inspector and appraiser, I have been employed with several companies.

Q. During that time?

A. Yes, sir.

Q. What experience have you had as owner and sailer of vessels?

A. Well, I have not owned any vessels, probably, for eight  
1095 or nine years. I did own some previous to that, but nine  
years ago I got clear of them.

Q. And have you ever been engaged as a sailor, Captain?

A. Since that?

Q. No; at any time.

A. Previous to that, yes, sir; I followed the sea for 23 years.

Q. As an assurance inspector and appraiser, what are your duties?

A. Examining ships and putting a valuation on them, and to see that a ship was fit to carry the cargo it had engaged to do. Their cargoes and sometimes the hull are offered, and I go down and examine the cargo and the hull; of course, if I do not think they are fit for our company to carry I say so, and if I think they are all right I give a certificate as all right; I make a report that the ship is all right for the voyage or a term of years, whatever the case may be.

Q. Where were you residing in August, 1893?

A. Baltimore.

Q. Were you engaged in this same business?

A. Yes, sir; and still am at the present time.

Q. Did you know the schooner Ellen Tobin?

A. Yes, sir; I knew of her—

Mr. HAGNER: Knew of her—I object to the answer.

Mr. WILSON: Go on with what you were going to say.

The WITNESS: I remember the schooner nine or ten years ago; she carried coal between Baltimore and the East, but since that I do not know anything about her—that is, nothing more about her than the books show.

1096 Q. Who was in command when you saw her last?

A. That I could not say.

Q. You do not remember?

A. No, sir.

Q. Did you see her more than once?

A. I think not. I think I was only on board the vessel once. She was lying at the coal wharf and I went aboard. I was surveying vessels at that time and used to go aboard. I was also lightering coal.

Q. The schooner Ellen Tobin is entered on the list of merchant vessels of the United States for 1893, under the number 8994, as being of 435.36 tons gross tonnage, 413 tons net tonnage; length, 136 feet 7 inches; breadth, 32 feet; depth, 14 ft. 5 in., and as having been built at Kennebunk, Maine, in 1874. She was a centerboard vessel. Will you state what, in your opinion, from your knowledge of vessels of that class, a vessel of that class, of that age, supposing her to have been in good condition, was reasonably worth in August, 1893?

Mr. HAGNER: I object to the question on the ground that that is not the best evidence, because the witness himself states that he has not seen the vessel for eight or nine years, and that the best evidence is the evidence or opinion of those who saw the vessel and examined her on board about the time of the injury.

The objection is overruled.

Mr. HAGNER: Allow me to make a further objection. I further object to the evidence on the ground that there is no statement of how the Tobin was built, what material she was built of, what her condition was at the time of the injury and immediately prior thereto.

The objection is overruled.

The WITNESS: The sails and rigging were in fair condition, I presume.

Mr. HAGNER: He has not been asked a word about the sails and rigging. I object to his answering about the sails and rigging.

Mr. WILSON: Assuming the whole vessel to be in good condition.

The objection to the question is overruled. The question is read to the witness, and he answers:

A. Thirty-two hundred dollars.

(By Mr. WILSON:)

Q. Now, will you state how you arrive at that valuation?

A. Well, I arrive at it from what vessels of about that age brought at auction and for what they have been appraised.

Mr. HAGNER: Now, I move that the answer be stricken out on the ground that an auction sale of a vessel is no criterion of the market value.

The objection is overruled.

Q. What was the condition of the market in August, 1893, for vessels of the class of the Ellen Tobin?

A. Very poor.

Mr. HAGNER: I have no questions.

1098 JAMES R. CLARRIDGE, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Where do you reside?

A. Baltimore.

Q. What is your occupation?

A. Ship chandler and grocer.

Q. Have you been engaged in the business of buying, selling, and chartering vessels?

A. I have been engaged in buying vessels; chartered but very few; used to charter our own vessels.

Q. Have you owned sailing vessels, and were you an owner in 1893?

A. Yes, sir.

Q. What kind of vessels?

A. Barks, ships, brigs, schooners.

Q. How many vessels were you interested in in 1892 and 1893?

A. Well, five or six.

Q. How many since 1866?

A. In the neighborhood of fifty.

Q. What personal knowledge had you of vessels arriving at Baltimore, engaged in the Baltimore trade, in 1893?

A. Well, I think I had pretty good knowledge. I know pretty nearly every vessel that came in. I had dealings with a great many of them, probably one-half or more.

1099 Q. Do you remember of ever having seen the schooner Ellen Tobin?

A. Yes, sir; but not for a number of years.

Q. Where did you see her?

A. She was in Smith's dock, Baltimore.

Q. When was that, do you remember?

A. I guess it has been ten or twelve years ago, perhaps more than that.

Q. The Ellen Tobin is entered in the list of merchant vessels of the United States for 1893 as of 435.36 tons gross tonnage, 413 tons net tonnage, 136 ft. in length, 32 ft. in breadth, and 14 ft. 4 in. depth of hold, and as having been built at Kennebunk, Maine, in 1874; she was a centerboard vessel. Will you state what, in your judgment, a vessel of that character, supposing her to have been in good order, was reasonably and fairly worth in August, 1893?

Mr. Hagner makes the same objection he made to the same question asked previous witness.

Objection overruled.

A. \$2,500.

Q. State upon what you base your judgment.

A. On vessels that I had at that time for sale and what I sold them for, younger than that. I have got some now I would see for less money than that.

Q. What vessels were they?

A. The schooner S. M. Bird was sold, for one, and the Rebecca Lambdin.

Q. When was the Rebecca Lambdin sold?

A. The Rebecca Lambdin was sold within the last two years. The S. M. Bird was sold five years ago.

1100 Q. Do you know of any vessels of the class of the Ellen Tobin being sold about the time mentioned, in August, 1893—that would be two years ago?

A. The Mary S. Bradshaw was sold about that time, in 1893; she was a Philadelphia schooner, or a New Jersey schooner.

Q. Was she sold through you?

A. No, sir; I got her price. She was overhauled in Baltimore

and sold there; but I do not remember now what the price was. She was about that age, I think.

Q. Do you remember any that were sold of which you knew the price?

A. No, sir; I cannot name any just now; I know my partner sold some, but I really do not remember the price.

Q. Well, in August, 1893, what was the market for vessels of the class of the Tobin?

A. Very poor. The market has been poor for vessels for the last eight or ten years. Vessels have not been making any money; I have not been getting any profit for mine.

Q. What do you mean by being poor?

A. There has been very little demand; if a man kept them insured he would be in debt.

Q. Do you know, in your experience, of any vessels of the class of the Tobin having made 20 per cent. per annum on their value, or anything like that?

Mr. Hagner objects to the question.

Objection is overruled.

A. I do not, sir.

1101 Q. What is the rule in regard to the deterioration of vessels from age? What is the deterioration estimated at in respect to the valuation and the coast?

Mr. Hagner objects to the question.

The objection is overruled.

A. I think it is about 8 per cent.

Q. Per annum?

A. Yes, sir.

Q. With reference to the keeping of the vessel in good repair, is that the percentage upon the supposition that she is kept in good repair?

A. Yes, sir.

Q. She deteriorates that much when kept in good repair?

A. Yes, sir.

Cross-examination.

By Mr. HAGNER:

Q. You spoke of your partner, what is his name?

A. Loud.

Q. How long since has he been a partner of yours?

A. Well, since 1866; he and I have been together since 1867.

Q. Is the firm still in existence?

A. Yes, sir.

Q. Did your firm fail within a few years?

A. I never heard of it.

Q. You said that your partner sold vessels. How were those vessels sold?



1102 A. At private sale.

Q. What was the occasion of their being sold?

A. We had a junior partner who retired from the firm in 1885, and I think about two years before he left we divided our vessel property up, about twenty eight or nine vessels, and we just put the names into a hat and shook them up and drew out to see which would take the vessel named on the ticket. He was sickly and died within three years after he left the firm. We divided the vessels up. Then Mr. Loud sold out quite a number of his pieces.

Q. When was it he sold those?

A. Within the last five or six years.

Q. When was the last one he sold?

A. In 1895 he sold one, the Evie J. Reed.

Q. In 1895?

A. I think he sold her this year; he certainly sold her since the first of 1894; he sold his pieces when he saw fit; I sold mine when I saw fit; I did not ask him anything about his and he did not ask me anything about mine; they were sold privately.

Q. When did you sell yours?

A. I did not sell any until about a year ago. I have got some for sale today.

By Mr. WILSON:

Q. How long have you been in business as a ship chandler and broker?

A. Commenced in 1857 in Baltimore, sir; in 1853 in Mobile, Alabama.

Q. And been in business continuously since that time?

A. All the time, thirty-nine years next April.

Q. I want to ask you whether vessels of the class of the Tobin are now built, or whether they are out of date?

1103 Mr. HAGNER: That is rather leading; I object to it.

A. Well, I think they are. I think there are very few of them being built, sir. The majority of the vessels being built now are large, from 1,500 to 2,000 tons, three or four-masted schooners.

Q. Why is that?

A. Well, they can sail them as cheap as they can small schooners; they carry more cargo, &c., and get better freights. There may possibly be some few small vessels built for certain purposes. A man may want one for his own use, but the majority of small vessels are getting out of date.

Q. Did you know of the schooner Edward A. Sanchez?

A. Yes, sir.

Q. She is entered here, in the same list, as of 492 tons gross tonnage, 468 net; 135 feet length, 33 ft. breadth, and 15 ft. 7 in. depth of hold; built in 1874 in Baltimore. Did you know that vessel?

A. Yes, sir.

Q. Did you know of her being sold; if so, when was it?

A. I know of her being sold, but she brought no price.

Q. Do you know when?

A. I could not place it.

Q. Within what time?

A. Within the last year. I had nothing to do with her and never kept the run of her at all.

1104 LYCURGUS P. GILKIE, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. What is your residence and occupation?

A. Baltimore; master mariner.

Q. Have you been a ship-owner in a small way for some years past?

A. Yes, sir.

Q. What kinds of vessels?

A. All kinds; from a small schooner of ninety tons to a ship of a thousand.

Q. Have you been the owner and master of vessels?

A. I have been part owner and master.

Q. For how many years?

A. Fifty years I have been going to sea; about forty-two years master.

Q. Sailing out of Baltimore?

A. No, sir.

Q. How long have you lived in Baltimore?

A. I have lived there fifteen years.

Q. Where did you live before that time?

A. I lived in New Jersey and in Maine.

Q. How many sailing vessels have you been part owner of?

A. About ten or twelve.

Q. Did you ever know the schooner Ellen Tobin?

A. I know of her.

Mr. HAGNER: I object.

1105 Q. Did you ever see her?

A. Once.

Q. Where?

A. In Philadelphia.

Q. How long ago was that?

A. I could not say.

Q. A few years ago?

A. No, sir; it must have been ten or twelve years ago.

Q. From your knowledge of sailing vessels, will you state what, in your opinion, the Ellen Tobin, a vessel of 435 tons gross tonnage, 413 tons net tonnage, and 136 ft. long, 32 feet in breadth, and 14 ft. 7 in. deep; built in 1874 at Kennebunk, Maine, a centerboard vessel—that vessel was reasonably and fairly worth in August, 1893, supposing her to have been in good condition?

Mr. HAGNER: I make the same objection to the question. The objection is overruled.

A. For me she would not be worth anything, only what she would be struck off for at a sale for old junk; but she might bring \$3,000, possibly. I should think about \$2,500 to \$3,000.

Q. That would be a fair market value if sold?

A. Yes, sir.

Q. What do you base your opinion upon?

A. Upon the fact that she could be built for \$18,000 today, now, all ready for sea. She would deteriorate 5 per cent. in 20 years and would be turned down by the underwriters as worthless, 1106 without a class, and to make her classable and valuable at all she would have to be rebuilt. Consequently, she would be fit for nothing but the coastwise trade, and carrying coal at that, as vessels of her class could not carry anything else to advantage.

Q. What was the market for vessels of that class in August, 1893?

A. If you had not a special trade for such a vessel you could not get money enough out of her to pay her expenses and run her. If you had a special trade for her you might get a little something out of her.

Q. Do you know of any vessels of the class of the Tobin having been sold about August, 1893, and what price they brought?

A. Well, I could not say of any vessel sold in 1893. The Edward A. Sanchez—you spoke of her. She was one of the class, and I gave away a piece of her two years ago. She ran so far in debt that I would not pay the assessment on her, and I gave it away there in Baltimore.

Q. Do you know of any sales in recent years?

A. The General Adelbert Ames.

Q. She was sold in Rockland, Me.?

A. Sold in Rockland, Me.

Q. For how much?

A. \$4,700.

Mr. HAGNER: I object to that.

Q. What is the estimated deterioration of vessels after they are built, provided they are kept in good order?

A. Five per cent. on the hull, if the vessel is kept in good 1107 running order; on the metal,  $2\frac{1}{2}$  per cent. a year for three years; then it is worthless; don't pay any average on metal over three years old.

Q. The schooner General Adelbert Ames appears in the list of merchant vessels of the United States for 1893 as of 476 tons gross tonnage, 552 tons net tonnage, 144 ft. in length, 33 ft. breadth, and 12 ft. depth; built in 1881; a longer vessel than the Tobin. Is that the one to which you refer?

A. Yes, sir.

Q. She sold for \$4,700?

A. \$1,700, and was immediately reclassified for five year- A 1 from that time; taken to Belfast and reclassified.

MICHAEL W. CROWELL recalled.

By Mr. WILSON :

Q. I want to know if you have any knowledge of the sale of the schooner Mary S. Bradshaw, which appears on the list of merchant vessels for 1893, as of 379 tons gross tonnage, 365 tons net tonnage; 32 ft. depth; built in 1874 at Philadelphia.

Mr. HAGNER : I make the same objection, as not being material. The objection is overruled.

A. Yes, sir.

Q. State what you know of her being sold, the time of sale, and the price she brought.

Mr. Hagner objects to the question. The objection is overruled.

1108 A. \$3,200.

Q. Where was she sold ?

A. At Baltimore.

Q. At what time ?

A. Beecham's ship yard, last fall a year ago—in the winter.

Mr. HAGNER : I object to the question and answer.

Q. State what personal knowledge you had of her condition.

A. Well, I inspected the vessel several times on her arrival in Baltimore, insured cargoes on her, and in 1892 put in new waterways, new streaks, new rails—laid out \$1,500 on her, superintending the work myself, at Skinner's ship yard, Baltimore. At the time of the sale in 1894 she had bought new spars and brand-new sails that had never made a voyage, and new wire rigging. Within the last two years she brought \$3,200, and I thought that a pretty big price, too.

Q. How was she sold ?

A. At auction.

By Mr. HAGNER :

Q. Do you know whether or not she had been in a storm and had been injured ?

A. Previous to this, certainly she had. She was in Beaufort and was towed to Baltimore with a cargo of phosphate rock.

Q. What year was it that she had been injured ?

A. In 1894.

Q. She was injured the year that she was sold ?

A. That fall; yes, sir. She was sold that same voyage.

1109 Q. She was rebuilt, then, after that ?

A. She was not rebuilt; she was repaired. There is a great deal of difference between rebuilding and repairing; and she was repaired and all of this extra work was put on her before.

Q. What did the sails cost, and the rigging ?

A. About \$1,800.

By Mr. WILSON :

Q. In regard to the wreck of the Tobin, suppose she had been sunk at her wharf in August, 1893, and had been in good condition before she sunk, what would the wreckage be reasonably worth?

Mr. Hagner objects to the question.

The objection is sustained.

Q. Supposing the Ellen Tobin had been in good condition before she sunk, in good condition in all respects, what would the things that could have been removed from her, the sails, anchors, and other movable things, be reasonably worth—what proportion of her value?

The question is objected to and the objection is sustained.

Q. What would be the value of a new suit of sails for a vessel of the class of the Ellen Tobin?

A. A whole suit—entire suit?

Q. Yes.

A. About \$1,500, I think, for the whole suit.

Q. What would be the value of the anchors and chains  
1110 that would be appropriate to a vessel of that kind?

A. I will have to do some figuring on that point; about  
\$500.

Q. You testified that you are an inspector for insurance companies. What is the insurable value and at what rates are vessels insured or the hulls of vessels insured when they are twenty years old?

The question is objected to and the objection is sustained.

Q. I will ask you the question whether the hull of a vessel twenty years old is insured at all by insurance companies.

The question is objected to and the objection is sustained.

By Mr. HAGNER :

Q. It is in evidence in this case that a suit of new sails was supplied the Ellen Tobin after she was purchased by Mr. Curtis, of Richmond, costing \$600. You estimate that the sails would cost \$1,500?

A. I do indeed.

Q. How do you make out the difference when this suit of sails was bought in Boston at a cost of \$600?

A. My experience with these small schooners of 80 or 90 tons has been that the sails cost between six and seven hundred dollars.

Q. Do you know of any vessel of about 90 tons recently equipped with sails at a cost of \$600?

A. I am not positive. I know I have heard it stated.

Q. You do not know it, then?

A. No; I did not handle it myself. I heard Sailmaker McGuire say that.

1111 LYCURGUS P. GILKIE recalled.

By Mr. HAGNER :

Q. Mr. Gilkie, when did you make your last voyage as master ?

A. Three years ago.

Q. Where did you go ?

A. I came from Brunswick, Georgia, here.

Q. And you were master of what vessel then ?

A. I was master of the schooner Belle Hooper and owned  $\frac{2}{3}$ ds of her.

Q. You were master of her, then, in August, 1892 ?

A. In August, 1892. I sold her in the fall—January.

Q. You sold her in January, 1893 ?

A. Yes, sir.

By Mr. WILSON :

Q. The vessel called the Belle Hooper is entered on the list of merchant vessels of the United States for 1893 as being of 475 tons gross tonnage, 451 tons net, 139 ft. length, 33 ft. breadth and 11 ft. 6 in. depth, and built in 1874. Is that the vessel that is referred to ?

A. That is the vessel ; but that book does not give a correct description of the vessel, because she has been decked all over and her depth is 16 ft. 2 in. I think, probably, this book gives that (indicating a later edition of vessel register).

Q. That is a later book ?

A. Yes, sir.

Q. What would she sell for ?

A. I sold my  $\frac{2}{3}$ ds at the rate of \$9,000 a year ago last—

1112 By Mr. HAGNER :

Q. At the rate of \$9,000 for the whole ?

A. Yes, sir. It was January, 1893.

By Mr. WILSON :

Q. Where ?

A. In New York I sold her.

By Mr. HAGNER :

Q. When interests in a vessel are sold at auction—64th or 32nd—is that a criterion of the value of a vessel ?

A. Hardly.

CHARLES G. ENDICOTT recalled.

By Mr. WILSON :

Q. When you were examined before, Mr. Endicott, you were handed a paper by Mr. Hagner, marked Libellants' Exhibit C, and asked if it showed her earnings and for how long, and you answered, "Five years; shows the earnings, the money expended on her, and the earnings over and above all it cost the owners." Exhibit C I

have here in my hand. Part of exhibit is the paper now shown to you, headed one column "Bills" and the other "Dividends." Is that the one to which you refer (handing witness paper)?

A. Yes, sir.

Q. What is that taken and made up from?

A. That is made up from the settlements of the vessel which the captain made to me, and this is the dividends divided to the owners.

1113 Q. And the other is the bills?

A. Those are the bills expended on the vessel.

Q. What book was that taken from?

A. That was taken from the settling book of the captain, whatever captain it may be.

Q. Who made it out?

A. This was made out by my book-keeper.

Q. Where is the book?

A. The book is in New York.

Q. This, as it appears, is a record of five years?

A. Five years.

Q. Is there anything on that paper to show what time it covers?

A. I do not know that there is.

Q. Nothing whatever?

A. No, sir; not that I am aware of.

Q. Are these bills and dividends yearly or quarterly, or what time do they cover—for instance, the first item there?

A. As I made the dividends. That is the schooner's run for three or four trips. They would put the bills out on the schooner and maybe make four or five trips before a dividend was made. Ordinarily there would be a dividend after two or three trips—that is, each time, so many made in five years.

Q. Do the dividends there cover the entire dividends for five years?

A. Yes, sir.

Q. And the bills there, in the other column, cover the entire bills for five years?

A. Yes, sir.

1114 Q. The bills are \$8,039.25?

A. Yes, sir.

Q. The dividends, \$10,511.34?

A. Yes, sir.

Q. And the difference between those two sums represent the entire earnings for five years?

A. No, sir; that is the money that was actually divided among the owners, \$10,511.34, for five years, and that is only to show the amount of repairs made on her. You see that is not a statement of the vessel; it is merely the amount of each dividend that was made to the owners of the vessel, and that (indicating) is the bills for five years.

Q. Is it not true, then, that in five years you paid ten thousand dollars in dividends?

A. Yes, sir.



Q. It is true that in five years you expended eight thousand dollars for bills?

A. Yes, sir.

Q. Then the difference between the bills and the dividends does not represent the net earnings. The ten thousand dollars, you say—

A. Is the net earnings.

Q. And in five years you say the vessel made ten thousand dollars net?

A. Clear of all expenses; that much was paid over to the owners.

Q. It was paid over to the owners. Did you get your share?

A. Yes, sir.

1115 Q. Every one got their share of these dividends?

A. Yes, sir.

Q. Does the book that you have show the amount of the bills?

Mr. Hagner objects to the question.

The objection is overruled.

A. Yes, sir.

Q. When you were last here you said you would ascertain what the share that you spoke of as having been sold sold for, and when?

A. Sold for \$280,  $\frac{1}{2}$ nd.

Q. When?

A. In May, 1890.

Q. Whose share was it?

A. It was a share owned by Moses Vannname. He was dead, and it was sold to close his estate.

Q. It was sold when?

A. In May, 1890.

Q. To whom?

A. Myself. I bought it.

Q. You paid how much money for it?

A. \$280,  $\frac{1}{2}$ nd share.

Q. How was it sold — at public or private sale?

A. At public sale.

Q. Where?

A. At the real-estate exchange, I think, Cedar street near Nassau, New York city.

1116 Q. When?

A. May 2, 1890, I think—within a day or two of that.

Q. Was there any return made of it that you know?

A. How do you mean?

A. To any court?

A. I do not know what the executor did; it was sold by order of the executor to close out the estate; of course, I know nothing about it beyond buying it and getting my bill of sale—about that part of it.

Q. You did not know of any other sale having been made?

A. No, sir; there has been, I think, never but one change in the ownership of that vessel.

Q. I call your attention to the fact that this paper with Exhibit C does not show any dates, and you say that this covers a period of five years—beginning when?

A. Starting back from about the time the schooner was lost. I could not give you the month or week.

Q. Of what year?

A. Of 1893, I think, she sunk, and running back five years.

Q. Running back five years?

A. Running back five years; yes, sir. That would take her back in 1888.

Q. And for these five years you made 26 dividends?

A. Well, whatever is there.

Q. Well, there are 26 dividends here.

A. Yes. It may have been that the last freight was not made into a dividend, the last freight that she was on, but the earnings were there. I will not be sure whether the last freight is in there or not as a dividend; it takes a correct account of her earnings, and I am not clear whether I included her last freight in there or not

1117 Q. What was her last freight; do you remember?

A. She had a load of coal, and then a load of cement.

Q. Where from?

A. She took the coal, I think, from Baltimore or Norfolk somewhere east, and brought a load of cement down here to Fort Washington.

Mr. WILSON: I now ask for the production of the book showing the receipts and expenditures for five years to which this paper relates.

Mr. HAGNER: We will produce the book.

By Mr. WILSON:

Q. Mr. Endicott, how are the dividends made which were paid; did you have a dividend book?

A. Yes, sir; we have it noted where we send each owner; one side the freights and the port charges and then the bills, leaving a net amount, and then on the opposite page the dividend to each owner; the book contains that; you can see it when you get it, Mr. Wilson.

Q. I want to ask you whether a sale of a 32nd of a vessel at auction is a fair indication of her value—a small interest like that.

A. A small interest, not ordinarily; sometimes they bring more and sometimes less than a vessel is worth.

Q. What was the value of the Ellen Tobin as a whole at the time of this sale?

A. We considered her worth at that time \$12,000.

1118 LYCURGUS P. GILKIE recalled.

By Mr. WILSON:

Q. Captain, you have spoken of the value of the hull of the Belle

Hooper. Will you state what was the condition of the Belle Hooper at the time she was sold, and what share in her was sold?

A.  $\frac{3}{4}$ nds were sold. She was in good condition, classed A 1.

Q. And in regard to the comparative value of the  $\frac{3}{4}$ nds; was that a master's share?

A. It was almost three-fourths of the vessel and I owned it, and I sold my interest—that amount. It was a master's interest, of course, because I was master of the vessel at the time.

Q.  $\frac{3}{4}$ nds carried the control of the vessel?

A. Yes, sir. She had new metal on her and a new suit of sails, and they always carried an extra suit of sails when they went to sea. She had been in a collision in 1889 and put into Norfolk—towed into Norfolk full of water and \$12,300 worth of repairs put on her, so that she was really almost as good as a new vessel. Then when she came up to Baltimore put \$400 more on her.

Q. That made \$13,000?

A. Almost \$13,000 paid out for the schooner in 1889. She was reclassified at that time as A 1 for five years. Then I sold her three years after that at the rate of \$9,000 for the whole vessel.

By Mr. HAGNER:

Q. Where was she wrecked?

A. Off Cape Hatteras; about three miles northeast of Hatteras—run down by a steamer.

1119 Q. Now, was there any transfer of her as a wreck?

A. No, sir.

Q. Then the same owners still owned her when she was repaired?

A. Yes, sir.

Q. She was repaired in Norfolk?

A. Yes, sir. Q. Repaired at an expense of \$12,300.

Q. Then there had been no sale prior to her repairs?

A. No, sir.

Q. Then what did you do with her after you got her off the ways at Norfolk?

A. Brought her to Baltimore and loaded her with flour for the Brazils.

Q. Then what was done?

A. Continued running the vessel to 1893.

Q. Was there any more repairs put on her—anything more put on her from the time she left Norfolk after she had some \$12,300 repairs and the time she got to Baltimore; was anything else put on her?

A. No, sir.

Q. What was put on her in Baltimore?

A. Well, things I could not get in Norfolk—outfit, rigging, tugs—at a cost of \$300 more.

Q. You sold her at auction?

A. Oh, no, sir; sold at private sale.

Q. Your interest in her?

A. Yes, sir.

Q. That 23-32nds brought at the rate of \$9,000 for the whole vessel?

A. Yes, sir.

1120 Q. Did anything happen to the vessel at all from the time she was repaired in Norfolk to make her less valuable up to the time that she was sold for \$9,000?

A. No, sir.

Q. Nothing at all?

A. Nothing but ordinary wear and tear.

Q. You say she was remetaled; what do you mean by that?

A. She was always metaled, and we took off her old metal and recalced the bottom and recoppered her.

Q. At an expense of \$300?

A. That was an expense of thirteen or fourteen hundred dollars.

By Mr. WILSON:

Q. When was that?

A. During the three years that I run her after the collision, after the repairs. (Examining list of merchant vessels.) She was re-metalled 4/90.

By Mr. HAGNER:

Q. Now, Captain, you take a vessel that has been in collision either with another vessel or any object, and you have her wrecked and she gets twisted and you repair her, is it not a fact that at any time that vessel encounters a storm that she is likely to be twisted again?

A. Well, she was not twisted at all.

Q. She was not twisted?

A. No, sir.

Q. I want to know about a vessel that is twisted. Suppose a vessel becomes twisted in a collision and her lines get out of shape and you repair her, is not a storm likely to put her back into  
1121 the same condition as before?

A. No, sir; not if she was properly repaired.

Q. Suppose a vessel is all twisted in a storm—

A. She could not be if properly repaired.

Q. I am talking about any injury a vessel has sustained where the lines are all twisted and the bends twisted. Now, you take that vessel and repair her, is she not likely twisted again? If an injury occurs to her is it not likely to be the same kind of twist as before?

A. Not necessarily so if you laid the vessel on blocks, straightened her out in proper shape, and repaired her at the time and put her in good order again.

Q. If she would encounter a storm would she not be likely to go back to the same twist?

A. Not necessarily; no, sir. If she had a weak spot she would show it, perhaps, in heavy weather.

By Mr. WILSON:

Q. Do you know, of your own knowledge and experience, what

the price was per ton for building vessels of the class of the Tobin in 1893?

Mr. Hagner objects to the question. The objection is not sustained.

A. I do not personally, because I do not think any of that kind of vessels were being built at that time. I did not see any and have not heard of any. I know of vessels as well built for \$40 a ton, all ready for sea.

Q. Of what size?

A. Well, all the way from six to a thousand tons.

1122 Q. You know of vessels of six to a thousand tons built in that year at the rate of forty dollars a ton?

A. Yes, sir.

Q. Where were they built?

A. Some in Bath, some in Millbridge, Maine. The Edmund M. Lampdin was built for less money than that; she was built for \$33,000, all ready for sea.

Q. The forty dollars a ton includes what?

A. Everything on board—hulls, spars, and outfits. The schooner Hugt Kelley was built for \$32,000.

Q. What was her tonnage?

A. I disremember the tonnage; somewhere from seven to eight hundred. The Clara E. Randall was built in Bath a year ago last summer for forty dollars a ton.

Mr. HAGNER: I object to the statement about last summer.

The WITNESS: I can get a vessel built like the Ellen Tobin in a dozen different places today in Maine at the rate of forty dollars a ton, and could have done so at any time during the last four years.

Mr. HAGNER: I object to that and move to strike it out. The objection is overruled.

By Mr. HAGNER:

Q. Was that register tonnage you speak of or carrying tonnage?

A. Registered tonnage.

Q. Registered tonnage, gross tonnage—800 tons you speak about?

A. About.

1123 Q. Is it not a fact that a vessel of 800 tons can be built very much cheaper per ton than a vessel of 413 tons registered? Is not that a fact?

A. It is a fact that a large vessel can be built a little cheaper than a small one.

By Mr. WILSON:

Q. How much cheaper? What is the difference? Will you state per ton between a vessel of 413 tons and a vessel of seven or eight hundred, approximately?

A. I could not say, but I should say about two dollars, by esti-

mate, between a vessel of four hundred and a vessel of eight hundred tons—two dollars a ton.

Adjourned until Friday, November 8, 1895, at 10 o'clock a. m.

NOVEMBER 8, 1894—10 o'clock a. m.

Hearing pursuant to adjournment.

Present: Messrs. Wilson and Hagner, of counsel.

CONRAD F. BENNETT, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. What is your occupation?

A. Shipwright.

1124 Q. Are you engaged in business here in Washington?

A. Yes, sir.

Q. How long have you been in business here as a shipwright?

A. I have been in business between twelve and thirteen years.

Q. What has been your experience as a shipwright and where have you been so employed?

A. Well, I first learned the trade in Philadelphia; in 1861 or 1862 I was free.

Q. With whom did you work?

A. With the Cramps and in Barlow's and Cooper's yards and at the navy yard in Philadelphia.

Q. And after that?

— I came here and worked in the Washington navy yard.

Q. You began business for yourself when?

A. I think about 1882; somewhere along there; about 12 or 13 years ago.

Q. What has been your principal business since that time? What kind of work have you done?

A. Repairing about vessels coming here; all kinds of work.

Q. Did you see the Ellen Tobin in 1893? If so, when and where?

A. I saw her at one time up at Georgetown, lying on the bottom, with stone in her.

By Mr. HAGNER: That is when she was sunk?

A. Yes, sir.

By Mr. WILSON:

Q. Soon after she sunk?

1125 A. Well, I cannot hardly state when it was. When I did see her I looked at her. I would not like to state the date now.

Q. Did you examine her?

A. I went aboard and looked at her, and examined her inside and outside to see the condition she was in.

Q. What was her condition so far as you could see?

Mr. Hagner objects to the question.  
The objection is overruled.

A. So far as I could see, she looked to me as if she was lying on something, I could not tell what, and her deck was raised up, I suppose, well, from twelve to fifteen inches; something like that—that is, about the well, the middle section of her.

Q. Now, in regard to her condition, as to her masts, rigging, sails, &c., did you see them?

A. Her rigging was broke. It looked not to be very good.

Mr. HAGNER: I object to this testimony as irrelevant and incompetent.

The objection is overruled.

Q. Did you see her sails?

A. Yes, sir; I saw her sails. They were poor.

Q. Old or new?

A. They were old—looked to me to be old.

Q. In regard to the appearance of the rigging, shrouds, &c., what did you say?

A. I think they were poor.

Q. And the masts?

A. I did not take much notice of the masts, but from the  
1126 condition of the vessel I saw she was old. I don't know when the masts were put into her. Of course the masts were old.

Q. Have you any knowledge of how old the vessel was at that time?

A. No, sir; I did not know how old she was, any more than I thought she was an old vessel by the looks of her.

Q. After you saw her in Georgetown, did you see her in Alexandria; and, if so, when and in what condition?

A. I did.

Q. What was her condition when you saw her?

A. She was on the railway, after she was hauled up the first time.

Q. Did you examine her?

A. I did.

Q. What was the condition of her keel?

A. Her keel was raised up, so far as I can judge, about 18 or 20 inches; maybe a little less, maybe a little more.

Q. Did you make an examination to form any opinion relative to the cost of repairing her and putting her in as good condition as she was before she sunk?

Mr. HAGNER: I object to that.  
Objection overruled.

A. Well, yes, sir; I did.

Q. State what your estimate of the cost was?

A. To my judgment I would do her for \$5,000. That is what I put it at.



## Cross-examination.

By Mr. HAGNER :

Q. Mr. Bennett, where is your place of business ?

A. Washington—here, Mr. Hagner.

1127 Q. Where is your place of business ?

A. Eleventh and Water street.

Q. What do you do there ?

A. I have a small marine railway.

Q. How long is the largest vessel you ever had on that railway ?

A. When I saw this vessel I thought I might put her up on my railway.

Q. I did not ask you anything about this vessel. I simply asked you the question, How long was the longest vessel you could put on your railway ?

A. Eighty-two feet long.

Q. That is the longest vessel you can put up there on your railway ?

A. That is the longest I ever had up there.

Q. What is the longest vessel you can put up there ?

A. Well, I might put up one a little longer.

Q. How much longer ?

A. When it comes to the pinch, I might haul up a little longer one than that.

Q. Well, coming to a pinch, how long a vessel can you haul up there ?

A. That I could not say, because I do not know.

Q. You are unable to say how long a vessel you can put up there on your railway when you have been working there for the last eighteen years ?

A. No, sir ; I did not say 18 years.

Q. How long have you been there ?

A. I have been down with the railway from eight to ten years—somewheres in that neighborhood. When I first went there I did not have the railway.

1128 Q. Can you say what is the longest vessel you can put up on your railway ?

A. I cannot tell you.

Q. What is the class of vessel that you put up on that railway ?

A. Pungies, tugboats, wood vessels.

Q. And scows ?

A. Yes, scows ; anything like that.

Q. Have you ever built a schooner like the Ellen Tobin ?

A. I have helped to build them.

Q. How long ago was it the last time that you helped to build a schooner like the Ellen Tobin ?

A. Well, when I was in Philadelphia ; and I also helped to build war vessels.

The AUDITOR : He asked you how long ago it was.

The WITNESS : Just after the war.

By Mr. HAGNER :

Q. Along during the war ?

A. Yes, sir.

Q. And you have not helped to build any vessel like the Ellen Tobin since the war ?

A. Not of that class ; no, sir.

Q. How long did you work in the navy yard at Washington ?

A. Well, I do not know ; worked there a considerable time.

1129 Q. A month or six years ?

A. Oh, yes ; a long while.

The AUDITOR : Which do you mean—a month or six years ?

The WITNESS : I worked six years ; all of that.

By Mr. HAGNER :

Q. You have already testified, according to my recollection in this case, that you saw the Ellen Tobin for the first time on the 18th day of November, 1893. Are you aware that she had then been sunk for three months and eleven days ; that when the tide was down her decks were exposed ; when the tide was up that they were covered ; that she had been drying and sweating in the rains and winds ; that her cordage had been broken by the very accident referred to ; that her shrouds had been broken by that accident, and that her sails had been on her all that time, and that she had been there exposed to the rising and sinking of the tide, all of which would tend to injure her ? Are you aware of that ?

A. The decks were not under water, because I was on her decks.

Q. I say when the tides were low her decks were above water, and when they were high the decks were under water.

A. They were above water at high tide when I went onto her.

Q. How many times did you visit her in Georgetown ?

A. I only went one time.

Q. What date was that ?

A. I disrecollect what it was.

Q. Do you remember testifying that it was the 18th of November ?

A. I disrecollect the date I was there.

Q. Do you know whether it was in August that you were on her ?

1130 A. I disrecollect.

Q. Do you remember whether it was September ?

A. I disrecollect ; I do not know ; I know I went aboard of her, but I do not remember the date.

Q. Did you see her when she was sunk at the mouth of the Seventeenth Street sewer ?

A. Seventeenth Street sewer ?

Q. Yes ; at the mouth of it.

A. No, sir.

Q. Did you see her when she was sunk over at Analostan island ?

A. No, sir.

Q. Did you see her when she was sunk at the upper part of

Alexandria before she was taken to the lower part and put on the railway?

A. No, sir.

Q. Was it hot weather or cold when you saw her in Georgetown?

A. Well, it may have been a summer day when I saw her there.

FRANCIS A. MARTIN, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Please state your residence and occupation?

A. I reside in Brooklyn, N. Y.; marine surveyor.

Q. For whom are you surveyor?

A. I am a surveyor for the New York Board of Underwriters and for the Record of American and Foreign Shipping, the book that has been referred to here several times and in the possession  
1131 of Mr. Endicott, and it is called the "Record of American and Foreign Shipping," New York, published by the American Shipmasters' Association. This volume (indicating) is for 1893.

Q. You are the surveyor for that?

A. I am one of the surveyors for that.

Q. How long have you been a surveyor for the board of underwriters?

A. Twenty years.

Q. And how long have you been a surveyor for this publication to which reference has been made?

A. Twenty-eight years.

Q. How many surveyors are there connected with this book and the board of underwriters?

A. There are three surveyors in New York connected with this book.

Q. And how many with the board of underwriters?

A. For the board of underwriters there are different surveyors—surveyors of old vessels and myself, a surveyor of damaged vessels; vessels that are in trouble in any way in which the board of underwriters have an interest.

Q. What are your duties as surveyor for the board of underwriters and connected with this book?

A. My duties as surveyor for the board of underwriters is to examine vessels that are damaged, when called upon; to recommend or contract for repairs; to assist the adjuster in spreading the bills for repairs; value vessels that have been called "general averaged," and sometimes with regard to old vessel, but not very often, because they have other surveyors for that.

Mr. HAGNER: It is admitted that this gentleman is a perfectly competent man.

1132 By Mr. WILSON:

Q. In the record to which you have referred the schooner Ellen

Tobin is entered. Did you have any personal knowledge or any recollection of any personal inspection of that vessel?

A. I have no recollection of ever seeing her. I may have seen her often.

Q. She appears in that record. Will you state what the characters and letters in the column of remarks signify?

A. (Examining book.) She was built of oak and yellow pine, iron and copper fastened; had large repairs in July, 1881, and decked in July, '85. "Clk.," calked 6/87—don't say how much. Docked, some repairs, 6/91. She had been classed May, 1885, for five years; expired by this time. The last time the Tobin was seen by a surveyor was in Baltimore, January, '92.

Q. When did she cease to be classed?

A. May, 1890.

Q. And has never been classed since that time?

A. Not under that name.

Q. The records show, as I understand you, extensive repairs to have been made in 1881?

A. Large repairs.

Q. State if the record shows that any large repairs were made after that time.

A. I do not find any large repairs.

Q. What does that star mean over a large cross?

A. That means "built originally under inspection of surveyors."

Q. From the description of the Ellen Tobin as contained  
1133 in the record, and assuming that she was in August, 1893, in good order, what do you say was her fair and reasonable market value at that time, namely, in August, 1893?

A. In my judgment, ten dollars a registered ton would be a fair value for her.

Q. Does this record give any information as to any peculiarities of the construction of the Tobin, in respect to her decks?

A. It does.

Q. Will you state—

A. The report of the surveyor who inspected her building described her as a double-decked vessel, two-decked vessel, with the upper deck boarded over all, as it is called, with her windlass and bowsprit under that deck, with double topgallant forecastle and galley, space for ceiling and cabin laid on the main deck; the deck below this was a light deck, and not as two-decked vessels are constructed in that respect.

Q. Will you state the relative advantages or disadvantages of that kind of construction, and whether vessels of that kind of construction are now built?

A. Well, that construction would be a disadvantage in carrying light cargo; it is generally not a disadvantage to a vessel carrying a fuller weight cargo. So far as I know now, vessels are not constructed in that manner now.

Q. What was the general demand or market for vessels of the class of the Tobin in August, 1893?

A. I do not know as I could say as to vessels of that class. The

market for vessels of all classes was very dull, and has been for some years.

1134 Q. And continue to be?

A. And continue to be.

Q. What, if anything, is the rule approximately or what is the rule for approximating the relative decrease in the value of vessels from age?

A. Well, we used to have a rule when business was pretty steady some years ago and amount to five per cent. depreciation up to ten and eleven and twelve years of age—ten years; after that somewhere about three per cent. Would consider that vessel at ten years worth half the original cost, at fifteen years old would be worth somewhere about a half, and at twenty years old a quarter—about that. That was a pretty safe rule to say she was worth about one-half.

Q. What is the effect upon the market, salable value of want of class in a vessel?

The question is objected to. The objection is overruled.

A. It is against the vessel.

Q. In reply to my question in regard to the value of the Ellen Tobin in August, 1893, you stated that in your opinion she would be worth, at a fair valuation, ten dollars a ton. Upon what is that based, and how is it arrived at?

A. It is based upon the sales of vessels about that time; within a year of it, anyhow.

Q. Were you at that time actively engaged in the business as a surveyor and performing the duties that you have spoken of here?

A. Yes, sir.

Q. Did you have occasion to examine any vessels during that year?

A. Yes, sir.

1135 Q. If from the testimony it appears or should be made to appear that the sails and rigging of the vessel were not new or in good condition, and that there was rotten wood in the centerboard and rotten planks in the deck to a limited extent, to what extent would that modify your opinion as to the value and the figures you have given us?

Mr. Hagner objects to the question. The objection is overruled.

A. That would depend altogether upon the amount of these defects—how much it would cost to replace them.

Q. Your valuation is based upon the hypothesis that the vessel, rigging, &c., were in good condition?

A. Yes, sir.

Q. If the sails and rigging were not in good condition, and there was rotten wood in the centerboard and in the deck, even to a limited extent, would that indicate, in respect to the condition of the vessel, whether or not she was in a good condition?

A. If that was the case?

Q. Yes, sir.

A. I would not call the vessel in good condition.

Q. What would a suit of sails cost for a vessel of the class of the Tobin in August, 1893, about, approximately?

A. Cost about \$1,200 at that time, I think; somewhere about that.

1136 Cross-examination.

By Mr. HAGNER:

Q. Mr. Martin, there was a gentleman named Mr. Charles J. Fox, of Franklin street, Richmond, who testified in this case. Do you know him?

A. I have met him once or twice, I think. He is a surveyor for this company.

Q. You have met Mr. Fox?

A. Yes, sir; twice, I think, altogether, for about ten or fifteen minutes each time.

Q. He is the surveyor of that company, and he testified in this case. He testified that the Tobin, when repaired in August of last year, that she was worth between twelve and fourteen thousand dollars. Do you think he is competent to pass on the value of a vessel?

A. Not if he said that; I do not.

Q. Did you understand my question?

A. You said he stated—that after the repairs were put on her he stated she would be worth from twelve to fourteen thousand dollars. I understand that.

Q. You say if he testified to that you do not think he is competent?

A. I do not, sir.

Q. That was hammered out of Mr. Fox by Mr. Wilson. He did not want to answer it, but the fact is Mr. Wilson kept pressing him. The testimony is that the vessel cost \$11,600 to repair, and that she cost them \$1,000 in her unrepaired and wrecked condition; that they did not put the centerboard in her, but made her a keel vessel; that it cost \$11,600 to make these repairs, so it stood them

1137 \$12,600. He replied to Mr. Wilson's question as to her value that the vessel was worth from twelve to fourteen thousand dollars. You think if he made that reply he is not competent?

A. I do.

Q. Are goods insured on merchant vessels, Mr. Martin, that are not classed in that record?

A. Oh, yes.

Q. The insurance companies, then, do not hesitate to insure goods that would be shipped on the Tobin simply because she was not classed?

A. At an extra premium; yes.

Q. They do not, however, refuse to insure because the vessel is not classed?

A. They do not refuse altogether, but take them at an extra premium. I know, as a rule, that vessels that are without class—

American vessels and particularly those that have had a class—are charged an extra premium by the board of underwriters for writing on cargo of goods.

Q. This vessel originally cost \$30,000, it has so been testified, and if this vessel cost \$30,000 and if she had been kept up well during her life from 1874, when she was built, up to 1893 would you say that she would be reduced to a fourth in value in 20 years?

A. I would.

Q. Would any of the repairs done to the Tobin necessarily appear in this record?

A. Any of her large repairs. It does appear here that she had large repairs.

1138 Q. The evidence shows that \$1,300 was put on her in 1891. Would such repairs as \$1,300 be considered large repairs?

A. No.

Q. What do they call large repairs?

A. When the decayed or broken wood is renewed—where a vessel has been in a collision and had considerable damage—or if she proved defective and a lot of rotten wood was taken out of her, and all that sort of thing.

Q. Do you call it large repairs—a repair which has some proportionate value to the entire value of the vessel?

A. They are not generally measured that way.

Q. You say \$1,300 would not be considered large repairs?

A. No; I do not think so. Some surveyors might call it large repairs. It would depend on the hull of the vessel. A vessel might have a new stern put on her, new rails, and a lot of planking about that place. You might call that large repairs. Those things depend a good deal on the surveyor.

Q. Do you know of any vessel sold in 1893 of the class of the Tobin?

A. I do not recollect one just like her at that time—of her tonnage. I do not know of any sold just like her for a good while.

Q. It is in evidence in this case that the Tobin was built at Kennebunk, Maine; that she was a much smaller vessel than was generally built at that port at that time, and that they put in her material that was suitable for a very much larger vessel. Would that make a difference, in your opinion, as to her value at this late date? That her timbers were heavier; that her keel was heavier; that all her material was heavier than is ordinarily put into this class of vessels?

1139 A. If her timber was any heavier than was called for it would be a disadvantage to her as to value.

Q. As to value?

A. Yes, sir; because she would not carry as much cargo.

Q. Would it make her degenerate faster?

A. She would degenerate faster in regard to rot and would not carry as much cargo, as this vessel did rot; that was the large repairs in 1881. She was rotten.

Q. I do not like to make dog eat dog, Mr. Martin, but I do want



to know if Mr. Fox testified to the fact that because of her larger timbers and stronger timbers that she was a better vessel than is generally set up or constructed. I want to ask you what your judgment is as to his being right about that.

A. She might be a stronger vessel; I do not say that she was not. You might make her solid and she would be still stronger, but it has been proved by long experience what is the right sort of timbers for vessels, and if you go beyond that in size you do more harm than good. You do harm to a vessel when her keel is made too large and not properly salted. You would find less ventilation in a vessel built in that way and less chance to salt it.

Q. Does it make a difference in the preservation of vessels to have them salted?

A. Oh, it does.

Q. This vessel was salted many times, as is shown in the evidence.

A. That would make a difference; it would help to preserve the timbers if they were properly salted. When you speak of the heavier timbers in the vessel I take it for granted you mean the frame of the ship.

1140 Q. Yes, sir; the timbers of the ribs and the other timbers.

A. You might intend to include the ceiling and planking.

Q. Well, the planking here is  $3\frac{1}{2}$  inches thick in this vessel; the keel was 18 in. by 22; the keel was heavier—

A. The keel in a centerboard vessel has to be wider.

Q. Now, Mr. Fox testified and all of the witnesses that the vessel's timbers—that is, her ribs, flooring timbers, and her futlocks—were all larger than usual in such vessel.

A. That is what I understand you to mean.

Q. That is what he said, and he thought the vessel larger for that reason?

A. Yes.

Q. Mr. Martin, it is in testimony in this case that the Ellen Tobin was sunk on an obstruction or by an obstruction in Georgetown harbor; when she was raised she was taken a quarter or a half of a mile farther down the river and she again sunk; that she was taken down the river nearly a mile farther and she again sunk; that she was taken over to Alexandria, seven miles below here, and sunk at the upper part of Alexandria. She laid there several weeks and was then taken to the lower part of Alexandria, about a mile from the point just mentioned, and sunk there at the railway; that she was then raised and put on the railway; that she lay on the railway from the 6th of January to along in February; then \$100 repairs were put on her to fill up the holes in her, put overboard, and put again on the ways; and all this time her sails were on her, and all her outfitings. Would such an experience as that to a vessel tend to improve her condition?

1141 A. No, sir.

Q. What would be the tendency of such an experience as that in a vessel?

A. Well, in regard to the vessel that was wrecked?

Q. Yes, sir; and the vessel itself?

A. In the condition that she was in in the beginning it would not change the vessel itself much there.

Q. Well, why?

A. It would not change the necessity of making repairs, such repairs as were required on her when she was first injured.

Q. Why?

A. I understand she was probably broken in two. I do not know whether that was so or not.

Q. Now, as to her outfitings?

A. As to her sails and rigging—the rigging, of course, would be left on there wet and dry and likely to become damaged.

Redirect examination.

By Mr. WILSON :

Q. Mr. Hagner asked you about the repairs made in 1881, and also about the repairs that were put on her in 1891. Both these repairs appear in the record to which you have referred, do they not?

A. Yes, sir; both are there—large repairs in May, 1881, and some repairs in June, 1891.

By Mr. HAGNER :

Q. She was repaired in 1881 and under inspection. Were any large repairs made to her in 1881 under your inspection?

1142 A. It was done at Wilmington, Delaware.

Q. If large repairs were made to her in 1881 she at that time was made a good vessel?

A. I believe so, sir; I think so.

Q. She would not have been rated if she had not been?

A. No, sir.

By Mr. WILSON :

Q. In regard to the repairs made in 1881 Mr. Hagner has spoken of, what were they and what was the occasion of making them, as shown by the record?

A. The occasion was that the vessel proved to be defective—rotten—to a great extent, and a great many defective timbers were taken out and replaced with new wood.

Q. Well, if a vessel was built in 1874, built well and built of good material, would she have required those repairs to have been made in 1881?

A. She should not have required them if properly ventilated or salted; she should not have rotted to that extent in that time. It does not necessarily follow that the timber was not good. It may have been want of ventilation—want of salting. She might have been carrying iron or coal. That will rot out a vessel very fast.

By Mr. HAGNER :

Q. What is the critical part of the life of a vessel, 7 or 10 years?

A. Supposed to be inside of 10 years; yes, sir.

1143 Q. If they last through that time or if repaired at that time, then are they not likely to last a very much longer time?

A. Yes; if they do not require them at that time they are as fully as likely or more likely to last a long time than if they have required no extensive repairs. A vessel at the age of 10 years or any other, which is perfectly sound and does not require any repairs, is a better vessel than one that has been rebuilt.

By Mr. WILSON:

Q. Do you know Mr. M. J. Crowell, of Baltimore?

A. Yes.

Q. What relation has he to this publication?

A. I do not think he has any.

Q. What is his occupation?

A. He is a marine surveyor.

Q. He inspects vessels for insurance—does he correspond with New York companies?

A. For a time, I think he does yet—has charge of the list of damaged vessels.

Q. For the board of underwriters?

A. For his own companies. I think he is engaged with several companies.

Q. Do you know Mr. Endicott, one of the parties in this proceeding, who is here?

A. Yes, sir.

Q. Did you ever survey any vessels for him?

A. I have within a year or two, a couple of vessels for Mr. Endicott, I think, one or two.

1144 By Mr. HAGNER:

Q. If a vessel is making 20 per cent. and has made 20 per cent. on a valuation of \$10,000 for 5 years prior to her injury, would that indicate or have some tendency to indicate what the vessel was worth?

A. No; that would only indicate what she was worth at that time to the owners and would not have anything to do with the price she would bring.

Mr. WILSON:

Q. What would be the market value of a vessel of the class of the Tobin absolutely and completely rebuilt in 1893—what would she have been fairly and reasonably worth?

The AUDITOR: Do you mean new?

Mr. WILSON: Yes; substantially.

The WITNESS: I do not know that I can answer that question.

MELBOURN P. SMITH, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Please state your residence and occupation.

A. Brooklyn; ship broker and ship-owner in a small way.  
1145 Q. And where have you been engaged in business as a ship-owner?

A. 21 years, and broker the same length of time; in New York.

Q. Where is your firm?

A. 41 South street.

Q. What is the name of the firm?

A. Smith, Gregory and Winters.

Q. How long has your firm been engaged in business there?

A. Three years.

Q. Well, as a ship broker, what knowledge have you and had you in 1893 of sailing vessels of a tonnage of from 400 to a 1,000 tons?

A. Well, as a broker for freights and charters for different vessels for difference voyages and buying and sailing vessels.

Q. Were you at that time—that is to say, in the summer of 1893—an owner or part owner of any vessel of the class of the Tobin; and, if so, what vessels and how many?

A. Well, I do not think of any exactly of her class, but I could come near to it.

Q. Well, state, if you please, what vessels of that class are worth?

A. I sold and retained an interest in a vessel that came pretty near the Tobin in that year, I think. I can tell in a moment (examining small memorandum book). That was in 1893. The bark Jose D. Bueno, 398 tons. We sold  $\frac{2}{3}$ ths of that bark in April, 1893.

Mr. HAGNER: I want to object to any testimony about a bark, which is entirely different from a schooner.

The objection is overruled.

The AUDITOR: Complete your answer.

The WITNESS: Shall I give the whole transaction?

The AUDITOR: Mr. Smith, you were only asked what vessels you owned. You were not asked what disposition you made of them.

1146 The WITNESS: That is the only one in 1893, sir.

By Mr. WILSON:

Q. I will ask you if as a ship broker and as the owner of any shares of any vessels you know what was the market value of vessels of the class of the Tobin in August, 1893.

Mr. HAGNER: I want to object to the term "market value."

The objection is overruled.

A. Well, not having any actual transactions, I only know in a general way.

Q. What knowledge had you in August, 1893, of the general demand at that time for vessels of the class of the Tobin?

Mr. HAGNER: I want to note an objection.

The objection is overruled.

A. I hardly know how to answer that, sir. The demand, so far as I know, for vessels of that description was very light.

Q. That is what I asked you exactly.

A. I have had no transactions myself.

Q. From your knowledge of the business as a broker and ship-owner will you state what you would consider the fair value of a vessel 136 ft. 7 in. length, 32 ft. breadth, 14 ft. depth and built in 1874, and of 414 tons tonnage in August, 1893?

MR. HAGNER: I note the same objection to this question that I have heretofore made to the same question.

The objection is overruled.

1147 A. I should set the value of vessels of that description from seven to ten dollars per ton on the register, according to the condition they might be in.

Q. Supposing that she was in good condition, had been extensively repaired in 1881, repaired again in 1891, and kept in good condition up to the time that I inquire about?

A. There are differences of opinion as to good condition; I should call it nine dollars a ton from what I overheard.

Q. What trade was you engaged in?

A. Coastwise and offshore.

Q. Prior to 1893, what was your practical knowledge of the value of vessels ranging from four hundred to a thousand tons burthen?

A. I sold more or less vessels of that class.

Q. What years?

A. From 1890 to 1893, I should say.

MR. HAGNER: I object to that because it is not near enough.

THE AUDITOR: It has been already stated that we would not confine this inquiry to the exact time of the loss.

By MR. WILSON:

Q. There has been given in evidence here a schedule of earnings, or supposed earnings, for five years prior to 1893. I would like to have you state what knowledge you had during the five years that preceded 1893, from actual experience, of the value of vessels of the class of the Tobin, about that class—schooners from 400, say, to 600 tons, what they produced.

1148 A. In the way of dividends?

Q. In the way of market value; just what such a vessel would sell for in the market.

MR. HAGNER objects to the question. The objection is overruled.

A. I think I stated my idea of the value heretofore. It was as regards—

Q. I want to know how you obtain that value?

A. I obtain it by prices we sold vessels for in the market, and also pieces of vessels that we bought.

Q. Can you state what vessels you bought during that time?

A. Bought the schooner D. D. Haskell—that is, an interest, not the whole of it. That was in 1891.

Q. What was her tonnage?

A. She was 317 tons, I think; it was a single-deck schooner.

Q. Built in 1881?

A. Yes, sir.

Q. What was her value?

A. We paid \$350 for  $\frac{1}{16}$ th; that would be at the rate of about \$5,000 for the whole.

Q. What was her condition?

A. Good; metaled.

Q. When was she built?

A. Built in 1881.

Q. Metaled?

A. Yes, sir.

Q. What others?

A. The H. J. Cottrell.

1149 Q. When was that?

A. About the same time. She was 336 tons, built in 1882.

Q. What was her value?

A.  $\frac{1}{16}$ th \$400—say \$6,000.

MR. HAGNER: I object to that. The objection is overruled.

Q. What else?

A. I do not recollect any others until 1893. That was this bark that was objected to. I think that is the only one in 1893—the Jose D. Bueno, 398 tons.

Q. What was that transaction?

A. We sold  $\frac{1}{8}$ ths of her at the rate of \$5,200 for the whole.

Q. When was she built?

A. 1875. This transaction was in April, 1893. She was a metaled vessel.

Q. What did it cost to metal a vessel of that size?

A. Oh, roughly figuring, I should say from a thousand to twelve hundred dollars.

Q. Anything else in that year?

A. Not in that year.

Q. Next year?

A. 1894; yes sir.

Q. What was that?

MR. HAGNER: Now, we are getting a year beyond our depth, getting into the deep sea again.

1150 THE AUDITOR: I will take this, subject to your objection.

By MR. WILSON:

Q. What was the transaction in 1894?

A. In January of 1894 we purchased  $\frac{15}{64}$ ths of the barkentine Henry Norwell, 507 tons register.

Q. Age?

A. She was built in 1873.

Q. Price?

A. This vessel was somewhat in debt at the time we bought her.

We paid at the rate of \$3,520, assuming the indebtedness, which was \$2,500.

Q. Making \$6,000?

A. Yes, sir.

Q. What was her condition?

A. Good; metaled; in good order all through. We also had a transaction with the brig Harry Smith.

Mr. HAGNER: I want to interpose the same objection as to all of these vessels.

Q. When was she built?

A. In 1875; 494 tons; double deck. All of these vessels that I have mentioned were double decked.

1151 Cross-examination.

By Mr. HAGNER:

Q. Your vessels run offshore mostly, every one of them?

A. The Henry Norwell does not; she is now on her way from Brunswick to New York with a cargo of yellow pine; she has been in that train for the past six months.

Q. And that is the only one that is not an offshore vessel of the ones that you have mentioned?

A. That is the only one that has been employed in the coastwise trade so far. Of course, they are in the market for any business they can get.  $\frac{2}{3}$ ths of her was sold in June, 1894, at the rate of \$5,000 for the whole vessel. This vessel was in excellent condition, being newly metaled, recalked all over, and sails in good condition. This is about in 1894.

Mr. HAGNER: I make the same objection.

By Mr. WILSON:

Q. Was there any schooner in 1895?

A. No, sir. I had transactions with new vessels during 1893, but none of these old—

Q. What had you with new vessels in 1893?

A. Built an interest in the schooner James H. Dudley, 350 tons register, at the rate of \$20,000 for the whole vessel; three-masted schooner; also the schooner Jane Hall, same year, 303 tons, at the rate of \$20,500 for the whole vessel.

Q. Any vessels of the size of the Tobin?

A. No, sir.

1152 Q. Did you have anything to do with the Carrie L. Tyler?

A. No, sir; I heard of her sale.

Q. Did you know personally of the sale?

A. Yes, sir. I knew she was in the market for sale and knew the man who bought her, but I had nothing to do with it myself.



By Mr. HAGNER:

Q. Are you engaged in the trade between Cape Henry and eastern ports?

A. Yes, sir.

Q. For coal, lumber, and cement to New York?

A. Cement usually came from New York.

Q. To and from New York. That is the idea?

A. Yes, sir.

Q. That is your particular branch of trade?

A. No, not particularly; we are in a general business. We charter vessels all over the United States.

Q. When was the last time you chartered a vessel to go up the Potomac river?

A. I do not know as I could tell you that. I have had vessels to Norfolk and Baltimore.

Q. How long has it been since you have had a vessel in Baltimore?

A. Within two weeks.

Q. Baltimore is an offshore port?

A. I do not consider it so; no, sir.

Q. You are not engaged in trading on rivers with vessels, are you?

A. We sometimes charter a vessel to carry a cargo up a river. I do not know whether you would call that a river trade or not.  
1153 Q. Are any of these vessels that you have named engaged in that Cape Henry and eastern port trade?

A. Well, not particularly the Cape Henry. The D. D. Haskell and the Cottrell are running in the yellow-pine trade, and go to Philadelphia, New York, and the east, as far east as Bangor, Maine.

Q. Well, are all the vessels you have named running in that trade or in the offshore trade?

A. No, sir; we have them in the offshore trade and coastwise as well.

Q. Give us your idea about what the indications are of a sixteenth or a small interest in a vessel giving an idea of the trade value of the vessel; do you think that the sale or a twenty-fourth or a sixty-fourth of vessel gives an idea of the true value of a vessel?

A. I hardly think it would.

By Mr. WILSON:

Q. In respect of the business of vessels of the class of the Tobin during the five years preceding 1893, will you state from your knowledge and the business in that year if there was profit in that trade and what the change was, if any, in the *and* quantity and value of the business.

Mr. HAGNER: I object to that.

The AUDITOR: You are speaking of the general business?

Mr. WILSON: I am speaking of the general business as affecting the value of vessels of this kind.

## The WITNESS:

A. I think the demand for that class of vessels from 1890 to 1893 was more than it has been since; business has been gradually growing worse to a certain extent.

1154 Q. How was it in 1889 and 1890?

A. Well, there was not much change between that and 1890; three or four years there was about the same.

ISAAC P. JONES, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Where is your residence and what is your occupation?

A. Brooklyn; shipwright.

Q. How long have you been engaged in business there?

A. Forty years.

Q. What is the name of your firm?

A. My firm is I. P. Jones at present.

Q. Did you know the schooner Ellen Tobin?

A. I do not know that I ever saw her.

Q. The Tobin is described as a vessel—

Mr. HAGNER: I want to make the same objection, that the witness does not know the Tobin, never saw her, and can only tell what she is worth by speculation; that he cannot tell of her condition, and does not — what she is built of, &c

The objection is overruled.

By Mr. WILSON:

Q. The schooner Ellen Tobin is described in the list of merchant vessels as being of 435 tons gross tonnage, 413 tons net, 136 ft. 7 in. long, 32 ft. in breadth, 14 ft. 5 in. depth, and built in 1874, a centerboard vessel, not metaled. What means of knowledge have you had of the value of a vessel of that class in 1893?

A. I saw some vessels sold at the time.

Q. Were you an owner during that time?

A. Yes, sir.

1155 Q. Of how many vessels and what class?

A. Well, I owned several vessels, different interests in 17 or 18 vessels in 1893.

Q. Of what tonnage?

A. Well, all the way from 350 to 800 tons, and some ships of 1,800 tons.

Q. You repair vessels at your yard?

A. Yes, sir.

Q. Vessels of this class?

A. Yes, sir.

Q. Assuming that the Tobin, as I have described her, was in good condition, or was made so, what would be her fair and reasonable value in August, 1893?

A. Well, I should put it at about 10 dollars a ton.

Q. Upon what would you estimate your valuation?

A. Estimated upon vessels of this class sold the same year, some I owned then, and what they were doing.

Q. In 1893 did you buy or sell any vessels or any interests in vessels of the class of the Tobin?

A. I saw vessels sold a little smaller than the Tobin.

Q. How much smaller?

A. About 392 tons.

Mr. Hagner objects. The objection is overruled.

Q. Where was the sale?

A. It was in Brooklyn.

Q. Were you present?

A. Yes, sir.

1156 Q. What was she sold for?

A. The schooner E. V. Glover sold for \$2,800.

Q. What was her condition?

A. Very good.

Q. Public sale?

A. No, sir; private sale.

Q. Do you know of any other sales about that time?

A. I know of a schooner that was sold in 1893 for \$3,600.

Q. What was her name?

A. Her name was the Stephen Bennett.

Q. What was her size?

A. 252 or 253 tons.

Q. Did you know of the sale of the Levi Hart?

A. Yes, sir.

Q. When was she sold?

A. The Levi Hart was sold in the fall of 1893.

Q. Where?

A. Somewheres down east.

Q. What knowledge had you of the price paid?

A. I had knowledge from the gentleman who bought her, Mr. Pendleton, with whom I was doing business every day.

Q. You do not know yourself, except from information he gave you what she sold for?

A. No, sir.

Q. Had you personal knowledge of the sale of any other vessels?

Did you know of the sale of the bark Tillid?

1157 A. Yes, sir.

Q. When was she sold?

A. I think she was sold in 1893.

Q. Where?

A. Burdett's auction-room, New York.

Q. Were you present?

A. Yes, sir.

Q. What did she sell for?

A. \$1,025.

Q. Did you know the vessel?

A. Yes, sir.

Q. What was her condition ?

A. Her condition was fair. She fetched in a cargo.

Q. Was she a sea-going vessel ?

A. Yes, sir; she brought a cargo of timber from Maine to New York.

Q. Was she metaled ?

A. No, sir.

Q. Did you know of the sale of the Adelbert Ames ?

A. Yes, sir; I know from the report of Mr. Pendleton.

Q. You do not know of your own personal knowledge ?

A. I did not see the money paid. I did not see anything of that kind. I know by what he reported, what he told me, and I do business with him.

Q. What was the demand for employment of vessels of the class of the Tobin in 1893 and for five years previous to that time ?

Mr. HAGNER: I object to the question.

The objection is overruled.

1158 A. I think the demand was very small; poor freights.

Q. Are you now the owner of any vessels of the class of the Tobin, say about 400 or 450 tons ?

A. I own a vessel of 480 tons.

Q. What is her name ?

A. Schooner Mary Jenness.

Q. What is her age ?

A. I think about 20 years old; somewheres thereabout.

Q. When did you get her ?

A. About twelve years ago.

Q. What was the value of that vessel in 1893 ?

Mr. Hagner objects to the question. The objection is sustained.

Q. What was the condition of the Jenness in 1890-1893 ?

Mr. Hagner objects to the question. The objection is overruled.

A. She has not paid nothing for four years; she has not paid a cent for four years.

Q. What was her condition ?

A. She was kept in good condition and she is supposed to be handled by a good man, Mr. Reed, of Bangor, Maine.

Q. What trade has she been in ?

A. General trade; some coastwise and some offshore business.

Q. Will you state whether in 1893 vessels of the character of the Tobin were built and have since been built ?

A. Well, I do not know; few vessels of her class have been built since 1893.

Q. Why ?

1159 A. Don't know; didn't seem to be so much in demand; building bigger vessels—built bigger vessels.

Q. Do you know the advantage of bigger vessels in comparison to smaller, or vessels of the class of the Tobin ?

Mr. Hagner objects to the question. The objection is sustained.

## Cross-examination.

By Mr. HAGNER:

Q. The Jenness is set down here as a barkentine (referring to a book in his hand).

A. She is a schooner now, sir.

Q. When did she turn to be a schooner?

A. She turned to be a schooner four or five years ago. Captain Cochran rigged her as a schooner for Rio.

Q. In 1893 she is recorded as a barkentine.

A. She is a three-masted schooner now and has been for over three or four years.

Mr. SMITH: Nearly six years.

The WITNESS: She was built first as a barkentine.

Mr. WILSON: She is put down here as a schooner (referring to list of American Shipping for 1893).

Mr. HAGNER: I move to strike out all that was said about vessels that were sold.

The motion is overruled.

1160 By Mr. WILSON:

Q. Mr. Jones, in regard to the wreckage of a schooner of the class of the Tobin, in the term wreckage what do you include?

A. The wreckage?

Q. Well, the vessel is wrecked. When you speak of the worth of the wreckage, what do you mean?

A. The wreckage will be what is left of the vessel.

Q. If the vessel had been in good order before she was wrecked, what would be the value of the sails, of the anchor, and of the other movable property, provided it was in good condition?

A. That I cannot tell; I am not in that business.

Mr. HAGNER: I move to strike out all this long list of vessels that this gentleman has mentioned, where he said he had heard the prices and did not know them.

The motion is overruled.

CHARLES G. ENDICOTT recalled.

By Mr. WILSON:

Q. Mr. Endicott, this vessel, the Tobin, was sailed on shares by the captain?

A. Yes, sir.

Q. That is, you paid the captain so much and he furnished the provisions for the crew, &c.; what they call sailing on shares?

A. Yes, sir.

1161 Q. I see the captain's share was changed from 50 to 60 per cent. Why was that?

A. Some time in 1892, I think that was, Mr. Wilson, coal freights went down as low as 70 cents, staid there a short time, and went back to 1.00 and 1.20, but we let him continue on.

Q. It was reduced in consequence, I understand, in the fall of freights on coal?

A. Yes, sir.

Q. 1893 they were again, were they not, over here (referring to Mr. Endicott's account book), the last trip in June and July, 1893, 85, 80, and a dollar?

A. Still that was higher than they were in 1891 or 1892, or about the same. The depression of the coal freights came some time in 1892; along the middle of the year, I think, went down as low as 70 cents.

By Mr. HAGNER:

Q. Do you mean by that 70 cents a ton?

A. Yes, sir; then they went back to a dollar and a dollar twenty.

By Mr. WILSON:

Q. When did they go back to a dollar?

A. In the spring of 1893.

By Mr. HAGNER:

Q. In the spring of 1893 they were \$1.25.

A. \$1.20, about.

1162 By Mr. WILSON:

Q. In the summer of 1893 they were from 80 cents to a dollar?

A. Yes, sir; but we did not cut the captain down again; we let him go on.

Q. 60 per cent.?

A. Yes, sir.

Q. The last \$464.78 mentioned on this schedule, I understand, was not distributed—that was not distributed and is still held?

A. Yes, sir.

Q. I see the greater part of the bills in the account are paid to Endicott & Co.; I suppose that is your firm?

A. Yes, sir; not the greater part of it.

Q. Not the greater number, but the greater part in amount.

A. They might be the greater number, but I do not think they are greater in amount when you go through them; there is the bill of Gokey's, twelve hundred and some dollars.

Q. That was for the repairs in 1891?

A. Yes, sir.

Mr. HAGNER:

Q. In 1891—it showed how much money was put on the sails of the vessel in 1891? I mean by that the s-a-i-l-s?

A. That was rigging you are thinking of; \$452 in rigging.

Q. \$452 in rigging in 1891?

A. Yes, sir.

Q. That is new rigging put on the masts that they testified was not very good today?

A. Yes, sir; that really should be added to the amount of Gokey's bill down there, which is \$1,214.

1163 Mr. WILSON: When we argue the case, I would like to have this book of Mr. Endicott's here, but to avoid the necessity of producing the book again I agree that copies may be substituted.

Adjourned until Wednesday, November 13, 1895—at 9 a. m.

WEDNESDAY, *November 13, 1895*—9 a. m.

Hearing pursuant to adjournment.

Present: Messrs. Hagner, Wilson, and Barnard.

J. HARRISON JOHNSON, a witness called in behalf of the respondents, having first been duly sworn, testified as follows:

By Mr. WILSON:

Q. Please state your name and occupation.

A. J. Harrison Johnson; one of the assessors of the District of Columbia at the present time.

Q. How long have you lived in the District of Columbia?

A. Since '63.

Q. What experience have you had as the owner, or charterer, or captain in the ownership and management of sailing vessels of from 300 to 600 tons?

A. I have not had the management of any sailing vessels or been interested in any over 300 tons.

Q. Under 300 tons?

A. I have been the owner and managing vessels up to September of 1894—been interested in them up to that time.

1164 Q. In what kind of vessels and what trade?

A. Well, engaged in trade between this city and Philadelphia, Richmond, Norfolk, and Baltimore; what we call coastwise trade—bay and coastwise trade.

Q. As a member of what firm?

A. Well, individually and also as a member of the firm of Johnson & Bros.

Q. What business were you engaged in individually and what business was the firm engaged in?

A. The firm was engaged in the wood and coal business and were part owners with me in some of the vessels.

Q. Did you ever see the schooner Ellen Tobin?

A. Not to take particular notice of her; the only good view I had of her was when she was on the railway and going down the river.

Q. When she was in Alexandria?

A. Yes, sir.

Q. The Ellen Tobin is described in the list of merchant vessels of the United States for 1893 as being of 435 tons gross tonnage and 413 tons net, 136 ft. 7 in. long, 32 ft. breadth, and 14 ft. 5 in. depth; built in 1874. She was a centerboard vessel. Supposing her to have been a good order, what would you say a vessel of that class was worth in August, 1893?



Mr. HAGNER: I want to object to the question on the ground that it is irrelevant and as not the best evidence—the same objection I made before—as the witness states he is not familiar with the vessel until after the injury.

The objection is overruled.

A. I should say from four to five thousand dollars.

1165 Q. What was the market for vessels of that class in August, 1893?

Mr. Hagner objects to the question and the objection is overruled.

A. I think the demand for vessels of that class at that time was not very great—not very desirable property.

Q. What would a vessel of that kind probably have sold for at auction in August, 1893?

Mr. Hagner objects to the question and the objection is sustained.

Cross-examination.

By Mr. HAGNER:

Q. The value that you have put on the vessel is at public sale?

A. That is based upon my general information—general knowledge of the value of such vessels.

Q. That is what she would have brought at public sale?

A. She would not have brought that at public sale in Washington.

Mr. WILSON: I call on counsel for the libellant to produce the report of a survey made on the Ellen Tobin in Philadelphia in March, 1893.

Mr. HAGNER: I will produce it if it can be produced.

It is stipulated and agreed between counsel that the testimony in this cause on the part of the respondent shall be closed on Tuesday next, November 19, 1895, and the hearing is adjourned until that date, at 10 o'clock a. m.

1166

NOVEMBER 19, 1895—10 o'clock a. m.

Hearing pursuant to adjournment.

Present: Messrs. Wilson and Hagner.

Mr. Wilson announces the evidence on the part of the respondents closed, and the hearing is adjourned subject to notice.

At the hearing in this reference on the 22nd of November, 1895, the witness Endicott reports that he has not in his possession, nor has his counsel, the report of survey made on the schooner Ellen Tobin in Philadelphia in March, 1893.

1167

*Testimony in Rebuttal.*

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	} District Docket No. 1. Admiralty. No. 379.
<i>vs.</i>	
CHARLES G. SMITH, SR., <i>et al.</i>	

Before the auditor.

WASHINGTON, D. C., November 22, 1895.

Hearing on notice.

Appearances: Randall Hagner, Esq., counsel for the libellants, and Messrs. Job Barnard and Nathaniel Wilson, counsel for the respondents.

JOHN S. MATHIS, a witness produced in rebuttal on behalf of the libellants, being first duly sworn, was examined, and testified as follows:

By Mr. HAGNER:

Q. What is your firm name?

A. Morris and Mathis.

Q. Where is your business located?

A. Camden, New Jersey.

Q. What is your business?

A. Ship-builders.

1168 Q. It has been testified in this case that there are no ships building now, no schooners, and I want to ask you if you have been recently building any vessels—whether or not you have been recently building any schooners.

Mr. WILSON: I object upon the ground that there is no such testimony. No one has testified to any such effect.

Objection sustained.

Q. Will you state whether it is proper or whether it is usual to value vessels by the ton, schooners—whether that is the usual way of valuing them?

Mr. WILSON: I object as incompetent, irrelevant, and immaterial, and because the witness has not been shown to have any knowledge whatever upon the subject-matter of this examination.

Objection sustained.

Q. What is the difference in the price of building vessels, schooners—in the expense of building schooners of four hundred tons and eight hundred tons?

Mr. WILSON: Objected to for the same reasons.

Objection sustained.

Q. I want you to give the names of any vessels of which you know that have recently been sold or bought and the prices that they brought, and particularly any in which Mr. Endicott is interested.

Mr. WILSON : Objected to for the same reasons.  
Objection sustained.

1169 Q. There is a witness who has testified here to the effect that the only difference in the expense of building a vessel of four hundred tons and eight hundred tons would be two dollars a ton. What is your idea on that subject? Is that correct? Is that a true estimate?

Mr. WILSON : Objected to for the same reasons and for the additional reason that there is no such testimony.  
Objection sustained.

Q. There have been a sea captain, several ship brokers, and owners of vessels who have testified for the respondents in this case that a schooner of 413 tons register, 19 years old, 136 feet long, 32 feet depth of beam, 14 feet 5 inches depth of vessel, was at the present time worth from \$2,500 to \$4,500, the vessel being in good repair, having been constantly kept in good repair ever since she was built. I want to ask you if that is a fair estimate.

Mr. WILSON : Objected — for the same reasons. I object to all the questions upon the ground that they are not proper in rebuttal.  
Objection sustained.

Q. Did you ever know the schooner Ellen Tobin?

A. I know of her; yes.

Q. I want to ask you what would have been the expenses, in 1893, of building a vessel like the schooner Ellen Tobin, she being a vessel of the description given above, including her outfitings and making her ready for sea.

Mr. WILSON : Objected to for the same reasons.  
Objection sustained.

1170 Q. There is testimony here to the effect that brigs, schooners, barkentines, and ships are all to be considered, if small, out of date. There is testimony here putting schooners and brigs and barkentines all on the same plane of valuation, because they say the trade is dead. I want to ask you whether or not these various classes of vessels, if you know, schooners, brigs, and barkentines, can be classed together as to valuation now.

Mr. WILSON : I object, first, because there is no such testimony, and, second, because it is immaterial, irrelevant, and not proper in rebuttal.

Objection sustained.

CHARLES G. ENDICOTT, being recalled as a witness in rebuttal on behalf of the libellants, was examined, and testified as follows:

By Mr. HAGNER :

Q. Was the sixty per cent. of the gross freights spoken of by you as being the captain's share outside of the two thousand dollars per annum that the book shows the Tobin has paid, or did it include that?

Mr. WILSON: Question objected to, except as it refers to and is supported by the entries in the book. My objection is to his stating the contents of the book.

A. It was outside of that. The book shows that.

Q. Have you put in a single bill of items of expenses with respect to the raising of the Tobin?

A. Yes, sir; that is condensed from the other statement  
1171 that has been admitted in evidence.

Offered in evidence, marked "Exhibit Endicott Last."

Mr. WILSON: Objected to as immaterial, irrelevant and incompetent.

Q. I want to ask you whether or not foreign vessels, those not registered in the United States custom-house, are allowed to trade in the coasting trade and river trade.

Mr. WILSON: Objected to as incompetent, immaterial, and not the best evidence.

Objection sustained.

Q. Will you give the names and sizes of any vessels that you have built or bought in for the past five years?

Mr. WILSON: Objected to as immaterial, incompetent, and irrelevant, and particularly objectionable in view of the decision of the commissioner on other questions.

Objection sustained.

A. I here present a list of two sheets of vessels I have bought in and built in, except the first item, that of the schooner Margaret B. Roper.

Mr. WILSON: I object to the answer.

Mr. HAGNER: This is offered in evidence and the list filed subject to the ruling of the commissioner (marked "Exhibit Endicott Very Last").

Mr. HAGNER: The testimony is now closed.

1172

DECEMBER 9, 1895.

Hearing pursuant to notice and agreement.

The subject-matter of the reference was argued by Mr. Hagner for the libellants, and Mr. Barnard and Mr. Wilson for the respondents, and concluded by Mr. Hagner for the libellants, and the matter submitted to the auditor.

1173

EXHIBIT ENDICOTT "VERY LAST."

Schr. Margaret B. Roper, contracted June, 1893.  
Launched Dec., 1893.

Register, 394 tons; cost, \$22,400.00.

Schr. Wm. H. Davidson, built July, 1894.

Register, 272 tons; cost, \$16,000.00.

Schr. Maggie M. Keough, built Jan'y, 1892.

Register, 555; cost, \$33,747.84.

- Schr. Thos. A. Ward, built Sept., 1891.  
 Register, 765 tons; cost, \$45,000.00.  
 Schr. Benj. A. Van Brent, built July, 1891.  
 Register, 1,132; cost, 57,499.20.  
 Schr. E. C. Knight, Jr., built Apr., 1874.  
 Register, 235; bought Oct. 26, 1894, \$6,400.00.  
 Schr. James Boyce, Jr., built 1882.  
 Register, 693; bought Feb'y 1894, \$16,000.00.  
 Schr. Jesse W. Starr, built 1874.  
 Register, 292; bought July, 1893, \$7,200.00.  
 Schr. George Churchman, built 1874.  
 Register, 268; bought May, 1893, \$8,000.00.  
 Schr. Gracie D. Chambers, built December, 1875.  
 Register, 360 tons; bought July, 1890, \$17,000.00.  
 1174 Schr. Byard Hopkins, built October, 1895.  
 Register, 269; cost, \$15,726.08.  
 Schr. Wm. B. Steelman, built July, 1875.  
 Register, 419 tons; bought July, 1892, 8,000.00.  
 Schr. Adele Thackard, built Dec., 1881.  
 Register, 577 tons; sold this spring, 12,500.00.

1175 *Exceptions to Auditor's Report.*

Filed Jan. 22, 1896.

In the Supreme Court of the District of Columbia, Holding the  
 United States District Court for said District.

CHARLES BURNETT <i>et al.</i>	} No. 379. District Court.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

Exceptions of libellants to the report of the special commissioner  
 and his mode and manner of executing the order of reference of  
 August 27th, 1895.

And now come the libellants and except to the report of the  
 special commissioner in this cause, filed on the 21st day of January,  
 A. D. 1896, for the following reasons:

1. Libellants except to said report because the said commissioner,  
 for the purpose of making up said report, in taking the testimony  
 of witnesses produced by respondents as experts, erred in allowing  
 and allowed the hypothetical question as to the value of vessels of  
 the size of the Ellen Tobin without insisting that the witnesses  
 should be informed of the character of the materials of which she  
 was constructed, which the former testimony of the libellants  
 showed were the best, namely, oak and pine, oak frame and yel-  
 low-pine planking, notwithstanding the objection again and again  
 interposed by the proctor for libellants on that ground against  
 said hypothetical question and notwithstanding the fact  
 1176 that the two records, one of the Shipmasters' Association and  
 the other of American and Foreign Shipping, both mentioned  
 in the report and introduced into the testimony, disclose the fact,

which is well known, that such sized vessels are often constructed of common pine or bull pine, as it is called, alone, or fir alone, or yellow pine alone, or yellow and white pine or packmatack alone, or cypress alone, or these materials combined and many other materials alone, all of which are inferior, so that in swearing that a vessel of the size and otherwise general character of the Tobin witnesses were in no way concluded by said hypothetical question as asked from giving the value of a vessels constructed of the very lowest and meanest material, even bull pine, and would still not render themselves liable for perjury, all of which is contrary to law and the proper and fair mode under rules maritime of valuing a vessel, as without giving the materials of which a vessel is built no hypothetical question would be proper, or fair, or valuable to a court for the purpose of valuation.

2. Libellants except to said report of the commissioner because in taking the testimony for the purpose of making up his said report he did not allow, and erred in not allowing, the evidence of Charles G. Endicott to be received contradicting and rebutting the testimony of witnesses for respondents as to the price such vessels as the Tobin could have been built for in 1893, said witnesses for respondents having testified that vessels of that character could be built new in 1893 for \$40 per ton, but without showing or citing any vessels that had been built for that amount at that time, and indeed declaring that no vessels were built at that time, whereas said Charles G. Endicott offered to prove and showed by a paper offered in evidence vessels that he had actually bought in and built in 1893

1177 which stood him in prices varying from \$70 to \$80 per ton, registered tonnage, as shown by the paper offered, but thrown out by said commissioner on the ground, as stated by said commissioner, that the testimony was offered too late and should have been offered in chief and should have been anticipated by libellants, all of which is contrary to the law maritime, it being well known and agreeable to the practice in the United States courts in admiralty not to allow any technical rule to apply to such cases and to admit any testimony whenever offered when the same is likely to throw any light or add anything to help the court in coming to a just and equitable decision on any question before it.

3. Libellants except, further, to said report of said commissioner in rejecting the said testimony of Charles G. Endicott, the ship's husband, in making up his report and then in said report accepting one single statement of said Endicott about a single vessel and making his whole report depend for the value of said schooner Ellen Tobin upon said single statement about a single vessel, when he, the said commissioner, had, contrary to the law maritime, thrown out and rejected all the other testimony of said Endicott on the trivial and altogether frivolous and untenable ground that the other testimony of said Endicott was produced too late, it being the well-known rule that in an admiralty court testimony may be admitted at any time.

4. Libellants except to said report because the said commissioner would not even let the stenographer who was taking down the

testimony as his clerk even take down the testimony of either Charles G. Endicott, the vessel's husband, or of John S. Mathis, 1178 a ship-builder, of Camden, New Jersey, as to the cost of building vessels in 1893, but positively refused, as shown by the record, to do so, although considerable expense had been taken by the libellants to get said ship-builder here in Washington and because of said refusal to take down the testimony, as is always allowed in an admiralty court, the same could not be gotten, and the court cannot here see the testimony of said ship-builder or of said Endicott, said witnesses having then and there been produced before the commissioner.

5. Libellants except to said report because in taking the testimony for the purpose of making up said report said commissioner would not allow the testimony of John S. Mathis, of the firm of Morris and Mathis, of Camden, New Jersey, ship-builders, whose testimony was offered by libellants to show the cost of building vessels like the Tobin in 1893 and who had in 1893 constructed and built for said Charles G. Endicott, in 1893, a vessel of the size and character of the Tobin, to be taken down for the purpose of showing that such vessels cost between \$70 and \$80 per ton in 1893, the said witness being then and there produced before the commissioner for the purpose of contradicting the witnesses of respondents and rebutting their testimony, who had testified that \$40 per ton would be the cost of constructing such vessel; and said commissioner, contrary to law, threw out and rejected said testimony of said ship-builder and declined to receive it on the trivial ground that the testimony should have been put in in chief and would not let the stenographer, his clerk, take down said testimony, although libellants had spent considerable money in bringing said ship-builder to Washington, and although the law maritime allows such testimony to be given at any time.

1179 6. Libellants except to the report of the said commissioner because the said commissioner did not in said report allow, and erred in not allowing, under the turn the case had taken, and made his ruling that the vessel should be valued as of a certain proportion, being a little more than one-fourth ( $\frac{1}{4}$ ) of her original cost of building, that proportion of her original cost of construction in 1874, which was \$30,000 in 1874, when said vessel was constructed, when the witness Martin, for respondents, whose testimony had been adopted by the commissioner in his report, testified on cross-examination that a vessel 20 years old was worth one-fourth of her original cost of building, while said Ellen Tobin was only 19 years old, instead of which said commissioner only allowed one-fourth of what some other new vessel would have cost if built in 1893 and not when said schooner Ellen Tobin was "fitted out and ready for sea," to use the exact words of said witness, Martin, and that by reason of said action and decision of said commissioner the said vessel was not valued at all according to law and precedent, and said vessel, schooner, the Ellen Tobin, is not valued at all by him in said report, but some other vessel is valued, which said other vessel was built in 1893, and that in consequence said report



deals with her value as if it was impossible to ascertain what her original cost was (whereas the ship's husband, Endicott, testified that her building cost in 1874 was \$30,000) and presumes to get the next best evidence by some other vessel built in 1893.

7. Libellants except to said report of said commissioner because said commissioner did not allow, and thereby erred in not allowing, the sum of \$2,600, which is shown by the book of original entries which was put in evidence in said cause had been spent on 1180 the said schooner Ellen Tobin within two years of the injury by which she was destroyed in Smith's dock, in Georgetown, and for the money of which destruction the libel in this case was filed, in addition to the proportion of a little more than one-fourth of her original cost, that being the valuation given her by one Martin, a witness for the respondents, and which under the law maritime should have been allowed the libellants.

8. The libellants except to the report of said commissioner because said commissioner did not allow, and erred in not allowing, the sum of \$790, it being the sum expended by the libellants in making preparation for and plan-ing the raising of said vessel Ellen Tobin, and getting experts to examine her, and getting bids for raising her, and getting out her cargo, and getting wreckers to plan about and inspect her before raising and with a view of raising her and her cargo, and for travelling expenses for such persons, and for the surveyors in coming to Washington, and for watchman, so that said vessel should not before her raising be picked and plundered of anyeverything valuable about her, and all such necessary expenses which had to be paid by libellants before they could raise said vessel and cargo or have her raised, and for her captain's going back and forth to get divers and wreckers prior to her raising, and for taking care of said wreck until it could be determined what to do with her and until she could be advertised and sold; all of which said sum and expenses were necessary.

9. The libellants except to said report of the commissioner because the said commissioner did not allow therein, and erred in not allowing, in accordance with the law maritime, interest 1181 on the sum awarded as the value of said schooner Ellen Tobin from the date of her wrecking and destruction, as without such interest your libellants have not full indemnity.

10. Because the commissioner did not allow interest (these libellants except to said report) on the sum of \$2,600 embraced in the 7th exception, being the sum spent on said Ellen Tobin for repairs within two years prior to her destruction, it being the law maritime that without interest on all sums of damage libellants are not indemnified, and the law being that indemnity is the rule in such cases to the owners of all vessels so injured.

11. Because the commissioner did not allow interest, these libellants except to said report of said commissioner, on the sum of \$790 expended by libellants prior to the said schooner Ellen Tobin being raised in and about getting ready to raise her and in and about travelling expenses of experts, surveyors, divers, and wreckers in getting ready and plan-ing to raise said vessel, as stated and set

forth in the 8th exception herewith filed, according to the law of indemnity in admiralty courts, it being the law that complete indemnity shall be given for a vessel destroyed by the negligence of any party.

12. The libellants except to said report of the commissioner because the said commissioner did not allow in said report, and thereby erred in not allowing, interest on the sum of \$1,240 paid by libellants on November 2d, 1893, for pumping out and removing the cargo of the Tobin, namely, broken or crushed stone, and placing the same upon the wharf of respondents, on the ground that libellants are entitled to full indemnity for all their losses by the law.

1182 13. The libellants except to the report of said commissioner because the same does not allow all the sums paid by libellants, amounting, besides the sum of \$1,240 in the last exception above named — the further sum of \$2,900 and interest thereon from the time the same was paid for putting this cause properly before the court, that being the sum libellants have paid, including examiner's and commissioner's fees for witnesses and their travelling expenses, in getting and sending witnesses back and forth to and from Washington, and for divers in going down to examine the wreck and rock on which said vessel was wrecked.

14. Libellants except to the report of said commissioner because said commissioner in said report did, and by so doing erred, cast a slur upon said vessel, the Ellen Tobin, by stating therein that she was "a centerboard vessel instead of a keel vessel," thereby intimating that a keel boat was more valuable than a centerboard boat for river trade and coasting trade, whereas there is not a single particle of testimony in the whole case that a keel boat is the best, but, on the contrary, the only testimony in the case on the subject is to the effect that a centerboard vessel is much more useful for the coasting and river and harbor trade, because much more easily handled, and that a centerboard would have cost \$1,000 to put in the Ellen Tobin, whereas a keel only cost \$52.

15. The libellants further except to the report of said commissioner because he did not in said report allow, and thereby erred in not allowing, the sum of \$650 for a new anchor and chain put upon the Ellen Tobin in March, 1893, just prior to her destruction, and in not allowing the libellants interest thereon from August 6th, 1893, the date said vessel was rendered a wreck by the negligence of said respondents.

1183 16. The libellants further except to said report of the commissioner because the commissioner in making up said report disregarded the testimony of the witnesses produced on the part of the libellants as to the direct and exact value of the schooner Ellen Tobin, they, the said witnesses of libellants, being the only witnesses at all in the case who had seen the Ellen Tobin for from ten to 14 years prior to her injury, that, libellants submit, being the best class of testimony in the case, as is decided by all admiralty courts.

17. Libellants further except to said report of the commissioner

because he therein rejects the evidence introduced by libellants of the book of original entries of the Tobin's earnings, which showed net earnings of twenty per cent. on a valuation of \$10,000 for five years prior to the vessel's destruction, and that by making the award of \$6,000 as the Tobin's value the commissioner assumed the unheard-of profit of \$2,000 a year net on a property worth, according to said report, only \$6,000, simply discarding every other consideration by the remark in the report that the Tobin might be lost; all of which is contrary to all decisions of the law maritime.

18. Libellants further except to said report of the commissioner because in making up the same the said commissioner decides that vessels in 1893 had no market value, notwithstanding the fact that a ship-builder, Park Agnew, a man who knows more about the value of vessels than any man examined in the case, because the ship-builder, being produced on behalf of libellants, testified that it

1184 was not until the winter after the destruction of the Ellen Tobin that vessels depreciated in value and lost their market value, and he on searching cross-examination and full cross-examination explained that this depreciation was caused by the action of Congress in relation to the tariff in the winter after her wrecking, and notwithstanding that all the witnesses of respondents were mere ship brokers and insurance men, while said commissioner threw out the testimony of another ship-builder, Mr. Mathis, who, as in a former exception shown, was produced on behalf of libellants and was not allowed to testify by the commissioner on the ground that his testimony was offered too late, although testimony is, as a matter of law, allowed to be given at any time in an admiralty case.

19. The libellants except to the report of said commissioner for many other erroneous omissions, both in receiving improper testimony and in rejecting proper testimony, in said cause and for other manifold errors appearing on the face of the record, and more particularly for making the question of non-insurance of the Ellen Tobin play any part in the case.

20. For not allowing \$10,000 as value of the Tobin, as shown by a fair preponderance of proof.

RANDALL HAGNER,  
*Proctor for Libellants.*

1185 *Motion for Hearing on Exceptions.*

Filed Jan. 22, 1896.

In the Supreme Court of the District of Columbia, Holding the United States District Court.

CHARLES BURNETT <i>et al.</i>	} No. 379. District Court.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

And now come the libellants, by Randall Hagner, their proctor, and move the court to give a hearing on the exceptions filed by

libellants to the report of the special commissioner filed in this cause and to require the respondents to fix a day by which their exceptions, if any, to said report shall be filed and argued, so that all exceptions to said report may be heard together and a trial had.

RANDALL HAGNER,

*Proctor for Libellants.*

Messrs. Nathaniel Wilson and Job Barnard, proctors for respondents.

GENTLEMEN: Take notice that I shall, on Friday morning next, at the coming in of the court, or as soon thereafter as counsel can be heard, that being the 24th day of January, 1896, call up the above motion for hearing before Mr. Justice C. C. Cole, this cause having, by stipulation of counsel and order of the district court, been referred to said justice for trial.

RANDALL HAGNER,

*Proctor for Libellants.*

1186      *Order Requiring Respondents to File Exceptions.*

Filed Jan. 25, 1896.

In the Supreme Court of the District of Columbia, Holding the District Court.

CHARLES BURNETT <i>et al.</i>	} District Court. No. 379.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

Upon motion of the libellants and consideration of the same as filed, it is thereupon, this 25th day of January, A. D. 1896, by the court ordered that the respondents file their exceptions to the commissioner's report, if any they have, within twenty-five days of this date.

CHAS. C. COLE,

*Asso. Justice.*

*Respondents' Exceptions.*

Filed Feb. 18, 1896.

In the Supreme Court of the District of Columbia, Holding a District Court of the United States for said District.

CHARLES BURNETT <i>et al.</i> , Libellants,	} No. 379. District Court.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

The respondents hereby except to the report of the special commissioner filed herein on the 31st day of January, 1896, for  
1187 the following causes—that is to say:

1. Because the said special commissioner in his said report found and allowed to the libellants the sum of six thousand dollars as the reasonable value of the schooner Ellen Tobin immediately prior to the injury.

2. Because the said special commissioner in his said report found and allowed to the libellants the sum of one thousand two hundred and forty dollars as the reasonable expenses for raising and removing the cargo of said vessel.

3. Because the said special commissioner in his said report found and stated no sum whatever as being the cost of raising and removing the wreck of said vessel Ellen Tobin.

4. Because the said special commissioner in said report did not, as required by said order, ascertain or report the net value of said wreck.

5. Because the said special commissioner in his said report allowed as the reasonable net value of the wreck of the said schooner Ellen Tobin one hundred and seventy-six dollars and eighty-eight cents, whereas in fact, as shown by the testimony in the case, said wreck was worth more than one thousand dollars.

6. Because the said special commissioner in his said report gives no consideration or weight to the direct testimony of the witnesses for the respondents as to the value of said vessel.

7. Because the said special commissioner in his said report ignores and gives no weight to the testimony of Capt. Francis Martin 1188 as to the value of said vessel and misapprehended and misapplies the value as to the depreciation in the value of vessels, as testified to by Capt. Martin.

JOB BARNARD,  
NATH'L WILSON,  
*Proctors for Respondents.*

*Motion to Set Time for Argument.*

Filed Feb. 18, 1896.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	} District Court. No. 379.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

And now comes the libellants, by Randall Hagner, their proctor, and move the court to set a day certain for the argument of the exceptions filed by both libellants and respondents.

RANDALL HAGNER,  
*Proctor for Libellants.*

Messrs. Wilson & Barnard, for respondents.

GENTLEMEN: Take notice that I shall, on Thursday morning, at the coming in of the court, on the 20th instant, or as soon thereafter as counsel can be heard, call up the above motion for hearing before Mr. Justice Cole.

RANDALL HAGNER,  
*Proctor for Libellants.*

1189

*Order that Testimony be Taken in Court.*

Filed March 10, 1896.

In the Supreme Court of the District of Columbia, Holding a  
United States District Court for said District.

CHARLES BURNETT *et al.**vs.*

CHARLES G. SMITH and CHARLES G. SMITH, JR.

} District Court.  
No. 379.

The court, upon hearing the arguments on the exceptions to the commissioner's report filed in this case, being of the opinion that justice requires that the witnesses offered by the libellants but rejected by the commissioner should have been heard and are entitled to be now heard orally in open court, it is by the court, this 10th day of March, 1896, ordered that before acting upon said report the testimony of J. S. Mathis and such other ship-builder as the libellants may produce, as well as the testimony offered by Charles G. Endicott, may now be taken orally in open court, and the court now fixes Wednesday, the 11th day of March, 1896, at 10 o'clock a. m., as the time for hearing said witnesses.

W. S. COX, J.

1190

*Testimony Taken in Open Court.*

Filed March 12, 1896.

In the Supreme Court of the District of Columbia, Sitting as a  
District Court.

CHARLES BURNETT *et al.*, Libellants,*vs.*CHARLES G. SMITH *et al.*, Respondents.CHARLES G. SMITH *et al.**vs.*CHARLES BURNETT *et al.*

} In Admiralty. No. 379,  
District Court Docket.

Testimony taken in open court on behalf of libellants and respondents in cross-libel by order of Justice Cox.

EQUITY COURT ROOM,

DIVISION No. 1, March 11th, 1896—10 o'clock a. m.

Met pursuant to above order.

Present: Randall Hagner, Esq., on behalf of libellants, and Nathaniel Wilson, Esq., and Job Barnard, Esq., on behalf of respondents.

Whereupon CHARLES G. ENDICOTT, one of the libellants herein and produced as a witness on behalf of libellants and having been first duly sworn by the clerk of said court, testified as follows:

By Mr. HAGNER :

Q. Mr. Endicott, in your last examination before the commissioner you produced this exhibit as a condensed statement of these items, that \$730 which you put in as the condensed statement of the work done and money expended in planing to raise the Tobin?

A. Yes, sir.

Q. Look at that exhibit and state what it is, and state whether it is a correct statement.

A. That is a correct statement, taken from our books as we paid the money out.

Mr. HAGNER : I offer that in evidence.

Q. The next exhibit is the one you have there, Exhibit Endicott, offered last. Just state, Mr. Endicott, if that is the exhibit which was offered also before the auditor, showing twelve vessels you bought in and built in in 1893, with the exception of the first item.

A. Yes; there are thirteen here; twelve of them are bought and built in.

Q. And the one you didn't buy in and build in is the first one there?

A. Yes, sir.

Mr. HAGNER : I offer that in evidence.

Q. Did you buy and build in those twelve vessels in 1893, all except that one?

A. They were not all in 1893, but about that time. Some of them were in 1894. The dates are given here.

Q. Four of them were in 1893?

Mr. BARNARD : I think you had better ask questions properly.

Q. How many were in 1893?

1192 A. There were three of them in 1893 and three of them in 1894.

Q. You said before the commissioner that you were negotiating for a vessel to be built. At what time was it that you were carrying on that negotiation?

A. In September, 1895. I think I testified October, 1895, but it was a few weeks before that.

Q. That you were negotiating for a vessel?

A. Yes, sir.

Q. And it was that time in 1895?

A. 1895.

Q. Compare the Ellen Tobin with the vessels you bought in and built in in 1893 and the vessels stated in that Exhibit Endicott offered last and state from that comparison what was the reasonable market value of the Ellen Tobin in 1893, just before her wrecking at Smith's dock, in Georgetown.

A. Taking in those I bought, it would be about \$25 a ton, registered tonnage. Her tonnage was 414, and that would be a little over \$10,000.



Q. It has been testified by the respondents' witnesses that the Tobin was undersized. Would vessels of the class of the Tobin and of her size be worth more or less because of that size and class as a double-decker?

A. More or less as compared with something; you want—

Q. Yes; would vessels of the class of the Tobin and of her size be worth more or less because of that size and class as a double-decker.

A. Well, she was of a desirable size for a great many lines of business, and was useful in that way.

1193 Q. Was she desirable for the line of business in which she was engaged?

A. Yes, sir.

Q. Why, Mr. Endicott?

A. For instance, she brought a load of cement here to Washington the trip she was wrecked, and, being double-decked, she carried it under deck, which is an important matter.

Q. Underdecked—what is that?

A. So that it would not be exposed to storm and rain, &c.; and still some was in dressed lumber, of which great quantities are being shipped. They prefer to have it carried in double-decked vessels instead of single-decked vessels, and in carrying rock in double-decked vessels we put part in the lower hold and part in between-decks, because that makes a vessel much easier and more seaworthy.

Q. You mean much easier in the sea?

A. Yes; and better for carrying rock than single-decked vessels.

Q. When you say carrying rock, what do you mean?

A. Fertilizer rock from South Charleston and around there, which is ground out into fertilizer.

Q. For any other reason? Do they carry barrel staves?

A. Yes; in carrying staves in great quantities. I have a number of vessels engaged in that line. They prefer that they be in double-decked vessels because they are not exposed to the elements.

Q. Where do they carry those from?

A. They carry them from Norfolk. They are manufactured in Norfolk. They are supplied in the rough, and they are not fit for barrels.

1194 Q. They are shipped in staves and made into oil barrels in New York?

A. Yes, sir.

Q. Of the twelve vessels you named how many had centerboards?

A. Well, I could not tell without examining the record, but I think, without exception, there may be one in the list that I am not aware of. The others are all centerboards.

Q. All centerboard?

A. Yes, sir.

Q. Much testimony has been given here by the respondents in respect to offshore vessels, barks and brigs and brigantines. Can offshore vessels be fairly classed and valued and compared in value to schooners like the Tobin?

A. No, sir; I think not. In the offshore business we come in foreign competition and English tramps, we call them—a number of vessels of that style, foreigners that engage in competition with us—and in consequence our trade in that line has been about ruined. In the coasting line we are protected.

Q. How are you protected in the coasting line?

A. No foreign vessels can engage in the coastwise trade.

Q. Under statute?

A. Yes, sir.

Q. Is there a difference in the cost of building vessels of the size of the Tobin because of the character of construction or the character of the materials?

A. Yes, sir.

Q. Could a larger vessel than the Tobin have been built for less money?

A. Yes; less money per ton.

1195 Q. Well, now, why?

A. Well, the bow and stern of a vessel are the most difficult parts in the construction, and you put that on small vessels as well as you do on large. When you get a large vessel a great deal of it is what we call straight work. A larger vessel can be built cheaper per ton. Take a vessel of eleven or twelve hundred tons and one of four hundred tons, and I think there would be a difference of ten or fifteen dollars a ton.

Q. In their building?

A. In their building.

Q. Would the difference in the way she is put together, her fastenings, make any difference in her cost?

A. Yes, sir.

Q. Was the Tobin very strongly—

Mr. BARNARD: I object to that.

The COURT: That is a leading question.

Q. How was the Tobin built?

A. She was well built. She was built under inspection. She was rated first class in every respect. She was built of heavy timber and well fastened in every respect and all good lumber, mostly oak and pine.

Q. I will ask you one more question in that respect. With vessels of cheap construction, how are the treenails fastened to hold her together?

A. They can peg them, as we call it, instead of driving them through and clinching them on the other end.

1196 Q. Instead of driving them [through they peg them and do not clinch them on the other end?

A. Yes; then they can put poor material in them, just like a new suit of clothes. You can get one for \$10 and you can get one for \$50. It all depends upon the material and construction.

Q. Was there a market for vessels of the character of the Tobin in 1893, at the time she was wrecked at Smith's dock?

A. Yes, sir.

Q. What was the character of the market?

A. It was a good, fair market. We were buying vessels, as the exhibit will show, during that year and the preceding one.

Q. Had a panic affected it at that time?

A. Not seriously. We were beginning to feel something of the effect of it.

Q. What would a vessel that was metalled indicate?

A. Ordinarily when a vessel is coppered—metalled, we call it—we consider she is built for the foreign trade, going offshore, as we call it.

Q. Compare the expenses of an offshore vessel and one engaged in the river trade, as the Tobin was.

A. The expenses were much heavier in running a vessel if she goes offshore—off to South America or Cuba. She is at sea a long time, and the wind tears the rigging and twists the sliding sails and rigging, &c.

Q. What amount of repairs were put upon the Tobin within the last seven years and a half—that is, the time I gather it to be back?

1197 A. It was a little over \$13,000. I think it was thirteen thousand two hundred and some dollars. It is in evidence.

Q. There were some \$2,600 you testified to being put upon the Tobin for repairs prior to her injury in Georgetown in 1893. Can you state what would be the amount of depreciation of those repairs within the two years up to August 1893; what was the amount of depreciation of that \$2,600?

A. I don't think it would be over ten or twelve per cent.

Cross-examination.

By Mr. BARNARD:

Q. Mr. Endicott, what is your business?

A. Ship chandler.

Q. What do you know about building vessels?

A. Well, I am engaged in that business, owning about 60-odd vessels. I contracted for them along at different times and saw them constructed. I am not a specialist in that line.

Q. You are not a builder of vessels?

A. No, sir.

Q. Do you know how those were built that you bought in 1893?

A. Only from an examination of the vessels when we bought them, by going aboard and looking at them, and by the statements of the record.

Q. Were they well-built vessels?

A. We so considered.

Q. As well built as the Tobin, were they?

A. Well, that I could not answer, because I didn't see them built.

1198 Q. You didn't see the Tobin built, did you?

A. No; I saw her while she was building, and then saw her after; went aboard and examined her afterwards. A vessel

that runs some sixteen or eighteen years, you can form as good an idea as you can if you saw it at the time.

Q. What was the occasion of putting so much repairs on the Tobin for the last seven years and a half?

A. Only to keep the vessel up in a good, seaworthy condition.

Q. Is it ordinary to put much repairs on a schooner of that size within so short a period?

A. Well, it is owing to how good condition you keep your vessel in. If we find anything defective, we replace it either in the hull or in the sails or the rigging.

Q. You speak of some repairs within the last two years, two thousand six hundred dollars or something?

A. Yes, sir.

Q. What was that?

A. That was for general repairs on the hull and rigging of the vessel and sails.

Q. At the time she was sunk what was her condition with reference to wanting repairs?

A. I don't think she needed any repairs when she sunk, except once a year we haul our vessels on the dry dock and look them over and see if there is anything necessary. I don't think there were any substantial repairs needed at that time.

1199 Q. When do you do that?

A. We do that in July or August, ordinarily.

Q. You had not overhauled her in 1893?

A. No; if she came back to New York, we would have done that—hailed her out when she came back.

Q. It was just about the period you usually do that when she sunk?

A. About that time.

Q. Do you know whether the Tobin hauled any cement in the last years of her being in your possession except this load she carried to Fort Washington?

A. I could not tell that without examining the records. All of our vessels carry more or less cement.

Q. Is it any advantage to have double-decked vessels for carrying coal?

A. Yes; I think it is.

Q. Her principal cargo had been coal of late years, had it not?

A. For the greater part of her life it had been coal.

Q. Had she been hauling fertilizer also?

A. I could not tell that she was ever engaged in that particularly. She may have taken loads at different times.

Q. Now, what was the size of those vessels you bought in 1893? There were three vessels you say you bought in that year?

A. Yes, sir.

Q. What was the size of those vessels, of each of them—how much tonnage?

A. The Jesse W. Starr was two hundred and ninety-two tons register; the George Churchman was 268 tons register.

1200 Q. It is on the exhibit, is it?

A. Yes, sir.

Q. They were all smaller vessels than the Tobin?

A. Yes; they were somewhat smaller.

Q. And would cost more per ton, in your judgment?

A. Yes, sir; some little more.

Q. Do you know of any sales being made of vessels of the size and general character of the Tobin in 1893?

A. No; I haven't any just her size.

Q. You are not an expert sufficient to tell the market value of that vessel at that time, are you?

A. Yes; I think I could form a good idea of her market value. I owned a number of her class.

Q. How would you ascertain the market value?

A. I would ascertain the market value by comparing it with vessels that were about her class and dimensions and what we considered them worth. You take these vessels that I bought in in 1893, and we could form an idea from them what the market value was.

Q. Those vessels were not old vessels, were they?

A. Two of them were built in the same year as the Tobin.

Mr. HAGNER: In 1874?

The WITNESS: In 1874.

Q. When were the others built?

A. There were only two sales in 1893, one in July, 1893, within five tons of the registered tonnage of the Tobin, built in 1875, one year afterwards.

1201 Q. How much did you buy; what part of these vessels did you buy?

A. There are a number of owners joined together to buy.

The James Boyce, Jr., we bought the whole of her; the Jesse W. Starr, we bought the whole of her, and the George Churchman, we bought the whole of her; the Gracie D. Chambers, we bought all but three-thirty-seconds.

Q. How much did you buy individually?

A. I would buy from one to three thirty-seconds, just as——

Q. In these three vessels you speak of?

A. In the Starr I bought three thirty-seconds; in the Churchman I bought three thirty-seconds, and in the Steelman I bought two thirty-seconds.

Q. You sold these various vessels goods, did you not?

A. Yes.

Q. And is that one reason you have to have in interest in so many vessels, to hold your trade as ship chandler?

A. Yes, sir.

Q. Do you know of any other vessels being sold, at either public or private sale, in 1893 of the class of the Tobin?

A. Only those that we bought in.

Q. Those are not of that class?

Mr. HAGNER: Within five tons of her.

A. One of them. I don't know of any being sold at that time just her tonnage.

Q. Was this one you say was built in 1875 and within five tons of the Tobin a double-decker?

A. Yes, sir.

1202 Q. And a centerboard vessel?

A. Yes, sir.

Q. What was the name of that vessel?

A. The William B. Steelman. I think she was a centerboard.

Q. William B. Steamer?

A. Steelman—William B. Steelman.

Q. Did that whole vessel change hands or only part?

A. The whole of her.

Q. At what price?

A. At \$8,000. I said the whole of her changed hands; nine-sixteenths at first, and then within a short time after that the balance, within one or two sixty-fourths.

Q. What was her condition with reference to repairs at that time?

A. She was in a good, fair condition.

Q. How recently had she been overhauled?

A. Well, I don't know; before we bought her.

Q. Had you been acquainted with the vessel before you bought her?

A. Never to be specially acquainted with her. I had seen the vessel before that.

Q. Where was she built?

A. She was built in Atlantic county, at a place near Absecon.

Mr. HAGNER: Near Atlantic City?

A. Yes, sir.

Q. Was she metalled?

A. No, sir.

Q. Did you have any vessels built in 1892 or '93?

A. That exhibit will show just—

1203 Q. I mean, did you contract to have any built?

A. I think there were one or two that came off in 1893.

Q. What yards were they built at?

A. Let me look at the names.

Q. Can't you tell without the names?

A. The Maggie M. Keough was built in 1892. She was built at Melford.

— — —  
A. No, sir.

Q. There is one boat here, the Gracie D. Chambers?

A. Yes, sir.

Q. You say it was built in 1875, 360 tons, and it was bought in July, 1890, for \$17,000?

A. Yes, sir.

Q. What was the character of that vessel that made you pay more than twice as much as you paid for the Churchman and Steelman?

A. Well, she was a great deal larger, to begin or, and that vessel had had extraordinary repairs put on her, owing to—

Q. She was only 360 tons?

A. Yes, sir.

Q. And the Steelman was four hundred something tons?

A. Yes, sir.

Mr. HAGNER: If you judge a vessel by the tonnage, you will get left.

Q. There was a better market for vessels in 1890, wasn't there?

A. Yes; and the demand was better in '90 than in '93.

1204 Q. Have there been any sales since 1893?

A. Of vessels?

Mr. HAGNER: I object to that. I have got enough to worry with without going into later dates. I want the court to get it all if it wants it and I withdraw my objection.

Q. Was there any demand for vessels of this kind—any market?

A. Yes, sir; I think constantly there are vessels being bought and sold.

Q. What was the tonnage of that vessel you are building at the present time, which you say cost sixteen or seventeen thousand dollars?

A. The Byard Hopkins? You will find it there. She came off about October.

Q. Last?

A. Yes, sir.

Mr. HAGNER: When you say came off, you mean she came off the railway complete?

A. Yes, sir; out of the ship yard's ways.

Q. What was her tonnage?

A. I don't recall her tonnage. Mr. Barnard, it is down there.

Q. 269 tons you have got there.

A. Yes; that is the correct tonnage.

Q. This Steelman you bought in July, 1892?

A. Yes, sir.

Q. Then there were only two vessels you bought in 1893?

A. Yes, sir; I corrected that afterwards, Mr. Barnard. I counted one that was built when I counted that first.

1205 Q. Mr. Endicott, you would pay more in proportion, would you not, for a small interest in a vessel than you would if you were buying the whole vessel for your purposes?

A. For my purposes; but those vessels I paid the same for as any other owner that would buy them all together, and I would not pay any more for them than other parties did.

Q. You got up a syndicate for these?

A. Yes, sir.

Q. The Tobin never engaged in offshore trade, did she, at all?

A. When she was first built she used to go to Cuba in the winter, and probably would make one or two trips in the winter.

Q. Without being metalled?

A. Without being metalled. We could not keep her constantly in the offshore trade without being metalled, but we could send her for one or two trips in the winter, in cold weather.

Q. When did she stop making these trips?



A. Well, I should say twelve to fifteen years ago; something like that—twelve or thirteen years ago; something like that.

Q. You found it more profitable to keep her along the coast?

A. Yes, sir; we built her so we could use her winters in the Cuba business, because it was profitable and useful in the winter time. We laid up our coast vessels for a couple of months, and after the offshore trade became depressed and practically worthless we stopped running her there.

1206 Q. There was nothing peculiar about the Tobin that made her more valuable to you for the purpose of transportation than any other schooner?

A. Not particularly; she was a staunch, well-built vessel, and adapted to our line of business, but she was nothing very different from any other.

Q. You could get any other boat for the same work it was doing?

A. Yes, sir; she was a good vessel; that is all.

Q. Had the Tobin been carrying staves of late years at all?

A. Yes, sir; occasionally.

Q. How recently?

A. I think she carried them within a year or so.

Q. This book you have put in evidence here is a correct record of her cargo?

A. Yes, sir.

Q. Mostly wood and coal within the last years?

A. Yes; that had been her business.

Mr. HAGNER: When you say wood, do you mean lumber?

A. No; she carried pine wood.

Mr. WILSON: Ties, coal, and cord-wood?

Q. Was there anything peculiar about the Tobin in reference to treenails as compared with these other boats you speak of?

A. All boats that are properly constructed, the treenails are driven clear through the vessel and wedged on both sides, on the inside and on the outside.

Mr. HAGNER: How long are the treenails?

A. Ordinarily from twenty-four to thirty-six inches long.

1207 Q. Was there anything different in her construction from that of the other boats in that respect?

A. I don't know about that.

Q. You are not an expert? Anyhow, as to the particular method of constructing these boats, that does not go into your business at all?

A. No; that does not go into my business at all.

Mr. HAGNER: I have one more witness I want to examine; a Mr. Matthews telegraphed to me that he is sick.

Adjourned to meet tomorrow, March 12th, 1896, at 9.30 o'clock a. m.

MARCH 12TH, 1896—9.30 o'clock a. m.

Met pursuant to adjournment.

Present: Same parties.

Whereupon JOHN S. MATHIS, a witness produced on behalf of libellants and being by the clerk of the court duly sworn, testified as follows:

By Mr. HAGNER:

Q. Give your full name.

A. John S. Mathis.

Q. Your business, please, Mr. Mathis.

A. Ship-builder.

1208 Q. And your place of business.

A. Cooper's point, Camden, New Jersey.

Q. And the name of your firm is Morris and Mathis?

A. Morris and Mathis.

Q. The schooner Ellen Tobin is T. R. M.—three-masted schooner. She was 136 feet long; she was 32 feet wide and fourteen and a half feet depth of hold; she was built at Kennebunk, Maine, in 1874; she was made of oak, oak frame with yellow-pine planking, iron and copper fastening, and she was repaired, L., large repairs, in the seventh month of 1881; she was a double-decked vessel; she was calked in the seventh month of '85; she was calked again in the sixth month of '87; she was decked, d'k'd again, and repairs on the sixth month of '95; she was 414 tons net register and her gross register was 435 tons. Did you know the Tobin or know of her?

A. I knew of her.

Q. (Continuing:) What would a vessel of that character named in the hypothetical question have cost—a schooner of her size and character—on or about August 6th, 1893; what would it cost to build her?

Mr. WILSON: I object to that.

Mr. HAGNER: On what grounds?

Mr. WILSON: On the ground that it is irrelevant and incompetent, and what a vessel would cost at Camden, N. J., in 1893. It is not the best evidence; it is not the evidence of value.

Q. Answer the question.

A. About \$30,000.

Q. How long would it have taken to build such a vessel, Mr. Mathis?

1209 A. About six months.

Q. What was the difference in the market price of labor and materials between the spring of 1874, when the Tobin was built, and the summer of 1893, August, when the Tobin was wrecked?

Mr. WILSON: I object to that, as he has not shown anything about the value in 1874; what the value was at Camden.

Mr. HAGNER: I desire to go back. I wanted to add to my hypothetical question that the vessel originally cost \$30,000, and I want to add that to my hypothetical question.

Mr. WILSON: I want to know what the hypothetical question is.  
Mr. HAGNER: I want to add to the description of the Tobin as having cost \$30,000 in 1874. What was the difference in the price of labor and materials in the spring of 1874, when the Tobin was built, and the summer—August 6th—of 1893, when the Tobin was wrecked?

Mr. WILSON: I object to that. He has not testified that he knew a thing about the value of anything in 1874, or that he was in the business then at all.

Mr. HAGNER: I suppose he knows what the cost of vessels was.  
Q. How long have you been in business, Mr. Mathis?

A. Twenty years.

Q. Now I will ask you a question.

A. Let me take that back there. I have been in business twenty-one or twenty-two years—that is, I was four years with my father, and in for myself—I started in 1877.

Q. You started in 1877 for yourself?

A. Yes, sir.

1210 Q. What was the difference in the market price of labor and materials between the spring of 1874 and the summer of 1893, for labor and materials on vessels like the Tobin?

A. There is no difference in the labor.

Q. There is no difference in the labor?

A. No, sir.

Q. What was the difference in materials?

A. About ten per cent.

Q. In favor of what?

A. Lower.

Q. 1893?

A. Yes, sir.

Q. What was the fair market value of a vessel of the character and size of the Tobin on August 6th, 1893? Have you seen the exhibit of Mr. Endicott, Exhibit Very Last, which he has sworn to here?

A. I know some of those vessels; that is a very fair price.

Q. What was the fair market value of a vessel of the size and character of the Tobin on August 6th, 1893, after comparing her with other vessels of her class? Have you a list yourself?

A. Yes, sir.

Q. Of vessels you built in and bought in in 1893, or about that time?

A. I should say ten thousand dollars.

Q. Have you a list there?

A. Yes, sir (Exhibit Mathis).

Q. What is this list, Mr. Mathis?

A. This is a list of vessels we owned in and bought in.

1211 Q. At the time stated there?

A. At the time stated there.

Q. Now, comparing the Tobin or a vessel of the character of the Tobin with the vessels named in your list there, that you bought

in and built in, and comparing a vessel like the Tobin with a list that Mr. Endicott has filed, marked Exhibit Endicott Very Last, will you state what is the fair market value or what was a fair market value of a vessel of her character on August 6th, 1893?

Mr. WILSON: All this is taken subject to our objection. Of course it opens up the whole case again, giving testimony in regard to the market value of the vessel, which is the primary inquiry.

Mr. HAGNER: And which you would not let us prove.

Q. You stated——

A. \$10,000.

Cross-examination.

By Mr. WILSON:

Q. What is your age?

A. I am 43 years old.

Q. How old were you in 1874?

A. 23 years old.

Q. You were 23 years old in 1874?

A. I was in my 23rd year. I was born in 1845—'50.

Q. Were you born in '45 or '55?

A. 1854.

Q. You were born in '54?

A. Yes, sir.

1212 Q. And in '74 were you twenty years old?

A. Yes, sir.

Q. What business were you in then?

A. I was working for my father.

Q. What was your father's business?

A. I succeeded him in business.

Q. What vessels did your father build in 1874?

A. The Rilly S. Derby.

Q. Built in 1874?

A. Yes, sir.

Q. What was her cost?

A. \$34,000 some odd; \$34,000 some hundred dollars.

Q. That would cost something over \$100 a ton?

A. That is what she cost; that is what we got; that is what father and Mr. Taylor got paid.

Q. What became of her?

A. She is running yet.

Q. Was she metalled?

A. No, sir.

Q. Here is another vessel, built in 1886. Is that the only vessel built in 1874?

A. No; I think there is another one.

Q. What was it?

A. I don't remember.

Q. Do you remember any other vessel built in 1874?

A. No; I didn't make any memorandum. I don't remember it.

1213 Q. 1875?

A. No.

Q. 1876?

A. There was not any.

Q. 1877?

A. There was the George C. Green.

Q. Are there any down here?

A. I don't remember all of them.

Q. Those are a list of vessels bought in and built in in 1893 or about that time?

A. I picked out vessels near the tonnage of the Tobin.

Q. I don't find anything here on this list from 1874 to '83.

A. Because I didn't—

Mr. HAGNER: He was asked to give vessels he bought in and built in in 1893.

Mr. BARNARD: If that is the question, there is not one either bought in or built in in 1893.

Mr. HAGNER: In that neighborhood.

Mr. BARNARD:

Q. Answer my question, if you please. Have you built any vessels from 1874 to 1883 of which you could tell the cost?

A. No; I didn't make any memorandum of that.

Q. You don't remember it?

A. No; I don't remember it?

Q. Did you built vessels every year?

A. In some years we did not.

1214 Q. Did you build any in 1875?

A. I don't know as we did.

Q. 1876?

A. I don't know as we did.

Q. 1877?

A. I don't remember.

Q. 1878?

A. I think we built in 1877. In 1877 we built the George C. Green. Let me see that list.

Q. I would like to have you tell me. You are a builder?

A. Yes, sir.

Q. You built the Derby in 1874?

A. Yes, sir.

Q. How many vessels have you built from 1874 up to the present time?

A. About thirty.

Q. Schooners?

A. I am only guessing. I cannot carry all this in my head.

Q. When were they built?

A. The George C. Green was built in 1877 or '8—

Q. That is the first one you remember after the Derby?

A. I cannot just remember that.

Q. I would like to have you tell me as closely as you can.

A. You have the list. You have the book.

Q. There is the book?

A. I say I would have to go all through that. We built the Green in 1877.

1215 Q. And the Derby in 1874?

A. The Derby in 1874.

Q. And the Green in 1877?

A. Yes, sir.

Q. And the next?

A. The Anne C. Grace in 1878.

Q. Well?

A. The William B. Wood in 1878.

Q. 1878; what else?

A. 1879—this is not positive—the Edward B. Lysing.

Q. That was what year?

A. That was '79 or '90.

Q. '79 or what?

A. You can tell from the book.

Q. I am asking your memory; that is what I am asking for now.

A. The Edward B. Lysing and the Angy N. Green.

Q. The Angy N. Green?

A. Yes, sir.

Q. What year was that?

A. You will have to look in the book.

Q. You don't remember?

A. The book will tell you.

Q. What is your recollection?

A. I don't remember.

Q. Whether it was in 1890?

A. 1889 or '90.

1216 Q. What is the next?

A. The Melville.

Q. When was that?

A. I don't remember the year.

Q. Don't remember the years at all?

A. I can give you the year.

Q. I want your memory, please.

A. I think it was about—let me see that list of mine, please. William H. Shubert, I think that there was in about—Shubert was built in 1884.

Q. 1884; well?

A. The Louis C. Cottingham in 1893.

Q. Is that the last one?

A. The J. H. Mathis.

Q. You are skipping about. I would like you to give them in order.

A. I cannot do that. The Morris in 1887.

Q. What is the last vessel you built?

A. The Sadie A. Thompson.

Q. When did you build her ?

A. 1892.

Q. You haven't built any vessel, then, since 1892 ?

A. She came off in 1893, in the spring.

Q. In the spring of '93 ?

A. Yes, sir, to the best of my knowledge.

Q. That is the last vessel ?

A. That is the best of my knowledge, either '92 or '93; I cannot say. The book will tell you. The Thomas A. Ward in 1891.

1217 Q. The last vessel you built was the one you named the Sadie A. Thompson ?

A. Yes, sir.

Q. What was her tonnage ?

A. I forget. I think it was about 700 tons.

Q. What did she cost ?

A. She cost fifty-four or fifty-five thousand dollars.

Q. Where she was built ?

A. We built her.

Q. The Thomas A. Ward, 1891 ?

A. Yes, sir.

Q. How much is that a ton ?

A. The Thomas A. Ward ?

Q. The one you built last.

A. How much a ton ?

Q. Yes.

A. We never build them by the ton.

Q. You don't build them by the ton ?

A. No, sir.

Q. Was she metalled ?

A. Yes, sir.

Q. Have you built vessels like the Tobin ?

A. Yes, sir.

Q. What vessels did you build that were like her ?

A. We built the Ida H. Mathis.

1218 Q. She was built in 1886 ?

A. She was built in 1886.

Q. What was her tonnage ?

A. Her tonnage was 412.

Q. She was metalled ?

A. No, sir.

Q. A double-decker ?

A. Yes, sir.

Q. Centerboard ?

A. Yes, sir.

Q. For what trade was she built ?

A. The coasting trade.

Q. What did she cost ?

A. She cost \$26,718.

By the COURT:

Q. What year was that ?



A. 1886. I built the sister one to her, the Morris. There was another, the sister to her.

Mr. BARNARD:

Q. The same shape?

A. No; she was built in the year before—in 1885.

Q. You said 1887 the Morris was built.

A. Did I say '87? I haven't it here on the list; it says a sister ship, but I have her cost, and her cost was \$30,000.

Q. When was she built?

A. Then there is a little difference.

Q. What made the difference between the two?

1219 A. Both were built on the same model and just alike.

Q. What made the difference in the cost?

A. In the fitting out.

Q. They were not fitted out alike?

A. They were not fitted out alike, but they were built just the same. (Shown book.) No; it was '84; that is right.

Q. Built in 1884?

A. Built in 1884. Twenty years is a good while to remember all these things, the dates, anyhow.

Q. Is it twenty years back to '84.

A. No; some of the others are.

Mr. HAGNER: I would like to explain, your honor, that the auditor limited them to vessels built within five years. That is the reason *we* take this testimony. The commissioner limited them to five years and us to five years.

Mr. BARNARD: I think you are mistaken about any limitation of that kind.

Mr. HAGNER: Get the record; it shows it.

The COURT: Back of 1893?

Mr. HAGNER: That is, five years before 1893 and up to the present time, or up to the time this testimony was taken.

Q. Do you know anything about the cost of building vessels at Kennebunk Port, Maine?

A. No, sir.

Q. What kind of timber did you put in that—the Morris and the Mathis?

1220 A. White-oak planking on the outside and white-pine deck and yellow-pine ceiling and beams and galvanized fastenings.

Q. Does your firm deal in vessels?

A. Yes, sir.

Q. Buys and sells?

A. Buys and sells.

Q. What vessels did you buy or sell in 1893, if any?

A. We bought the Liza A. Scribler.

Q. The Eliza A. Scribler?

A. Liza A. Scribner.

Q. When did you buy her?

A. I think about—let me see ; 1894.

Q. That does not answer my question. I asked you if you bought any in 1893.

A. Oh, I misunderstood you.

Mr. HAGNER : You can look at your list, if you like.

The WITNESS : I didn't put that down. I am pretty sure we did, but I cannot think of it now. The John B. Page we bought in 1893.

Q. What kind of a boat was she ?

A. She is 378 tons register.

Mr. HAGNER : A schooner ?

A. A schooner, two-masted, centerboard schooner.

Mr. BARNARD :

Q. How about her decks—were they single decks ?

A. Double decks.

Q. You bought her in '93 ?

1221 A. Let me see that list.

Q. Let me examine you without looking at the list. Do you remember when she was built ?

A. Yes, sir.

Q. When ?

A. In 1892.

Q. And where was she built ?

A. She was built by us—by my father and Mr. Taylor.

Q. What was her condition when you bought her ?

A. She was in good condition—rebuilt.

Q. Rebuilt ?

A. Yes, sir.

Q. When has she been rebuilt ?

A. She was rebuilt in 1893.

Q. Rebuilt that year ?

A. Yes, sir.

Q. Did your firm buy the whole boat ?

A. We only bought an eighth.

Q. An eighth ?

A. That is all.

Q. Did you pay cash for her or take her for rebuilding as part payment ?

A. We paid cash.

Q. What did the rebuilding cost ?

A. It cost in the neighborhood, I think, of \$3,800.

Q. What did you pay for your one-eighth of the vessel ?

A. We paid \$400—\$450 besides the rebuilding ; an eighth of the rebuilding.

1222 Q. You did pay for her by the rebuilding, then ? You took your bill out on the vessel ?

A. No ; we paid cash for our one-eighth of the rebuilding and paid \$450 for the one-eighth besides. The other owners that would not pay up we bought. I didn't own the vessel previous to rebuilding.

Q. What did you pay for the one-eighth?

A. We paid one-eighth of \$3,700, about. I think we paid \$850 or \$900; somewhere along there.

Q. For an eighth?

A. Yes, sir.

Q. Was she as good as a new boat at that time, practically?

A. No, sir.

Q. What is the difference?

A. Well, you cannot make an old boat as good as a new one.

Q. Do you have any ratio of depreciation in your business as to boats?

A. Yes, sir.

Q. What is it?

A. It depends upon what condition they are kept in.

Q. Suppose they are kept up in fair condition.

A. Then the ratio is very small.

Q. Would you pay as much for an old boat, if kept up in fair condition, as you would for a new one?

A. No; I suppose you would pay a little over half. A vessel built in 1874, they value her at \$16,000 now. She has been kept in good condition—the Rilly S. Derby.

Q. What is the effect on a boat, Mr. Mathis, of hauling coal for a series of years as compared with other cargo?

1223 A. I don't know as it is any harder than any other. It is a little harder than offshore trade.

Q. In what way?

A. Vessels trading foreign.

Q. I mean in what way is it harder. What effect does it have on a vessel?

A. Laying aground.

Q. Laying aground?

A. Laying aground with her cargoes in.

Q. Vessels frequently have to lay aground to load and unload in hauling coal?

A. Sometimes they do and sometimes the docks are dug out so you don't have to lay aground much.

Q. Is there any particular danger to a vessel if she is staunch and all right because of having to lay aground?

A. Not if the bottom is level.

Q. Is the bottom of the boat level?

A. Yes, sir.

Q. Built on a straight line?

A. Yes, sir—that is, the keel is, you know.

Q. The loading of a vessel would have a tendency, will it not, to break a vessel in two when she is not staunch, when she is not trimmed right, if she has to lie on the ground, even on a level bottom?

A. No; that does not effect it.

Q. No pressure?

A. They load them so, whatever they are loaded with, that they are trimmed so as to spread it out.

1224 Q. That is the business of the master of a vessel, to see that they are properly trimmed?

A. Yes, sir.

Q. It is the business of a master to see that she is lying all right for safety?

A. Yes, sir.

Q. While she is loading?

A. Yes, sir.

Q. Do you own the whole of any vessels or only a portion?

A. A quarter is the largest interest we own.

Q. How many vessels does your firm own or have an interest in?

A. We own—it is in the thirties. We own over thirty different vessels—that is, interests.

Q. Do you own in any of the vessels Mr. Endicott has an interest, in?

A. Yes.

Q. How many?

A. Two of them—three of them.

Q. Did you build any of those vessels Mr. Endicott has an interest in?

A. Yes, sir.

Q. Have you been acquainted with the Derby ever since she has been built?

A. Yes, sir.

Q. How many times has she been repaired or rebuilt since your father built her, in 1874?

A. I could not tell you; but she has had temporary repairs every year.

1225 Q. If a vessel is properly built, what, in your opinion, would be her life before she would have to be rebuilt on account of rotting of timbers?

A. That depends upon the cargoes they carry.

Q. Suppose she is engaged in the offshore trade and coasting trade together, carrying ordinary cargoes that you pick up, ought she to last seven or eight years or longer?

A. They are compelled—the insurance companies compel them to open them up—that is, about every seven years.

Q. Every seven years?

A. Yes; we open them, and if they are all right they reclass them and they go seven years more.

Q. Like the life of a man, having periods of seven years?

A. Yes, sir.

Q. Changes her constitution every seven years?

A. Yes, sir.

Q. What cargoes will rot a vessel the worst?

A. Our experience has been phosphate.

Q. That is, these phosphates brought up from the South?

A. Yes; rocks.

Q. Phosphate rocks?

A. Yes, sir.

Q. You know nothing about the condition of the Ellen Tobin at the time she sunk?

A. Only from hearsay.

Q. You never built or repaired her?

A. No, sir.

1226 Q. You never saw the vessel, that you know of?

A. No, sir.

Q. How do you fix the market value of that vessel at \$10,000?

A. By comparing her with other vessels of the same dimensions—that is, what we value them at and what they have been sold for lately, within the last four or five years.

Q. This vessel you bought in 1893 is very nearly the size of the Tobin, and you didn't pay any such price for her?

A. Sometimes people have to sell and you can buy cheaper.

Q. They had to sell her?

A. They had not the money to pay—

Q. They didn't sell her at auction?

A. No; they were glad to give her to us.

Q. There was not much demand for vessels at that time, was there, in 1893?

A. No.

Q. The trade has gone down somewhat?

A. No; 1892 was a very good year and 1893 it went down a little.

Q. Was any other vessel offered you in 1893 for nothing?

A. No; understand, this vessel was not offered me for nothing, only this interest was offered because the parties could not afford to pay up. I would not take it and I would not take it now what I paid for it.

Q. I understood you to say they offered to give it to you?

A. It was only this one-eighth these parties could not pay up. The vessel was not offered.

1227 Q. Do you know of any other vessels sold that year except that one you bought the interest in—that one-eighth interest?

A. No.

Q. Then your idea of the market value is simply on that one vessel, so far as any actual sales are concerned?

A. Let me look here a minute.

Q. This book would not give it to you?

A. The only one we have is the Louis Cottingham.

Q. You didn't offer any vessels for sale that year?

A. No, sir.

Q. Do you know of any others that were offered for sale?

A. No, sir.

Q. And you never contracted to build for so much a ton?

A. Never since we have been in business.

Q. Do you make estimates at all of the cost of vessels?

A. Yes, sir.

Q. How do you estimate?

A. In 1891 we built the Thomas A. Ward for \$35,000, complete, for a lump sum.

Q. For a lump sum without regard to tonnage?

A. Tonnage? We never take that into consideration.

Q. Do not ship-builders frequently build for so much a ton?

A. Down East they do, but not down our way.

Q. That is the way they do?

A. That is the way I understand. I have it only from hearsay.

Mr. HAGNER: The Supreme Court says down East does not affect us any. It says the vessels shall be valued at the place she was injured or the nearest port of importance.

1228 The Witness: Let me look at that list again.

Mr. HAGNER: I want to make that list part of the testimony.

Mr. BARNARD: It is understood that list is in.

It is agreed that the list is offered in evidence.

Mr. BARNARD:

Q. How do you ascertain the difference in the cost of material between 1874 and 1893 of ten per cent. that you speak of?

A. Well, there is only a few on my list there. There were other materials that are not on there. Take the cost right through, and they amount to very near ten per cent.

Q. How do you make the estimate of ten per cent. as the difference in the cost price of materials in 1874 and 1893?

A. I didn't go over it so very particular, but I estimated it from the different materials with my partner's help.

Q. There is a good deal of guess-work about it?

A. There is some guess-work. It is not the exact percentage.

Q. It is not exact?

A. There is the main objects, the oakum, spikes, and lumber. I guess if you figure that there it will be ten to fifteen per cent. Understand, I put that price of three and a half as I did—let me show you.

Q. What do you mean by the red ink?

A. That is the cost of the vessels. Here is the spikes; we marked them three and three-quarters, and there are all sizes used in them and they vary. This red ink—let me explain that to you. The vessel is an old vessel. We bought her in in 1888, and we paid \$9,780. That is what the red ink is.

1229 Mr. HAGNER: The black ink is the new vessel, and the red is the old vessels?

A. Yes, sir.

Mr. BARNARD:

Q. Those red-ink figures is the total value at the rate at which you bought a portion of her?

A. Yes, sir.

Q. And the black ink indicates the share you bought or what you bought?

A. Yes, sir.

Q. The black ink is in the same column?

A. That is what they call it.

Q. The red ink is the total cost?

A. The black figures denote the cost—the cost of the interest we own—and the red ink is the total cost.

Q. Mr. Mathis, the estimate you made on this paper is between 1874 and 1894. You have not made any estimate of the cost of materials in 1893?

A. In 1893 and '94 there is no difference.

Q. No difference at all?

A. No, sir.

Q. Mr. Mathis, what would you value a vessel that was bought in February, 1894, of 693 tons register, built in 1882 and sold in February 1894, of that tonnage—a schooner?

A. That depends upon the condition she is in. I would have to know what condition she was in.

1230 Q. In good condition.

A. 690 tons register?

Q. 690 tons register.

A. I should say about \$15,000. What was the age of her?

A. Built in 1882. What would you estimate a vessel built in 1874 of 292 tons register, sold in 1893—July 1893; what would you estimate a vessel of that size to be worth, supposing she was in good condition—a schooner 292 tons register, built in 1874 and sold in July '93?

A. Single-decked?

Q. Give us either single or double.

A. That makes a big difference.

Q. Well, give us the difference.

A. I should say about \$7,000.

Q. What is that—single or double decked?

A. \$7,000 for a single-deck and \$8,000 for a double.

Q. How much did you say you put in the John D. Page before you bought in her in 1893—the cost of rebuilding?

A. \$450. I cannot say positively; I think it was.

Q. You say \$450 was an eighth of her cost?

A. I was mistaken; it was \$7,200 we paid for her.

Q. You paid for the John D. Page the whole cost, \$7,200?

A. \$7,200. That is what we bought in at.

Q. How much did the repairs or the rebuilding cost before you bought in?

A. The repairs cost, so far as I remember, thirty seven or thirty-eight hundred dollars.

1231 Q. Thirty-eight hundred dollars?

A. Thirty-seven.

Q. Did she then have a class for insurance?

A. Yes.

Q. What was she classed?

A. She was very low.

Q. Classed low?

A. Classed low.

Q. What was her class?



A. No; she didn't get a class.

Q. She didn't get a class?

A. No, sir.

Mr. WILSON:

Q. Didn't she get a class after putting on those repairs?

A. No; she didn't get any class.

Q. What is her name?

A. John D. Page.

Q. John D. Page?

A. Expired (reading from book).

Q. If this vessel had been classed after she had been repaired, it would not show in this book?

Mr. BARNARD: That is the 1893 book?

A. That says 1892.

Q. You rebuilt her in 1893?

A. Yes, sir.

Q. This book would not show whether she was classed or not?

A. No. You have not got a later book?

1232 Mr. HAGNER: I have a book of 1894 in my office. You gentlemen can have it if you want it. It has never been in the record. I will let it go in evidence now.

Mr. WILSON: We would like to see what it says first.

At the same time and place and in the presence of the same counsel also appeared J. H. BEECHAM, a witness produced on behalf of libellants, who was duly sworn by the clerk of the court and was examined—

By Mr. HAGNER:

Q. You have been sworn?

A. Yes, sir.

Q. Mr. Beecham, what would it have cost to build a vessel of the class of the Ellen Tobin, the description of which you have heard here, have you not?

A. Yes, sir.

Q. What is your business?

A. Ship-builder.

Q. In Baltimore?

A. In Baltimore.

Q. What would it have cost to have built a vessel of the class of the Ellen Tobin, the description of which you have heard, in 1893?

Mr. WILSON: That is objected to. He is not a witness that was offered before the auditor.

The COURT: If you are going to reopen that, I will have to sustain the objection. You don't go into that now.

1233

## EXHIBIT MATHIS.

Morris &amp; Mathis, ship-builders and contractors, Cooper's point.

Ellen Tobin, register 414 tons.

865, M. B. Baird, 1890, 54,000.\*

765, T. A. Ward, 1891, 45,000.\*

Ton reg.	Name.	Built.	$\frac{1}{2}$ Cost.	$\frac{1}{2}$ 1889. Paid.	$\frac{1}{2}$ 1893. Paid.
398	R. S. Derby .....	1874	{ 1,083 56 }	232 60	Repaired.
412	J. H. Mathis.....	1886	{ 34,673 92† }	135 10	72 30
			{ 834 96 }		
			{ 26,718 72† }		
612	H. B. Ritter.....	{ 1878, bought† }			
		{ 1888 old }	{ 305 63 }	112 11	Repaired.
			{ 9,780 16† }		
561	R. M. Walls.....	{ 1879, bought† }			
		{ 1888 old }	{ 441 70 }	271 36	Repaired.
			{ 14,134 40† }		
646	G. W. Sweeney.....	{ 1876,† 1888 old }	{ 400 00 }	83 16	{ Lost.
			{ 12,800 00† }		{ 25.54.
514	C. E. Schmidt.....	1883	{ 1,025 00 }	99 88	70 71
			{ 32,800 00† }		
611	W. H. Shubert.....	1884	{ 1,072 00 }	178 96	56 10
			{ 34,304 00† }		
519	S. H. Davidson.....	1883	{ 1,074 87 }	131 73	{ Repaired.
			{ 34,375 00† }		{ 16 00
498	L. K. Cottingham..	1883	{ 1,044 11 }	99 49	33 88
			{ 33,408 00† }		
378	J. D. Paige.....	1872, 1894	{ 7,200 }		

Sails, rigging, and outfits about the 10 % more in 1874.

	1874.	1894.
Oak plank.....	4½	4½
Oak flich.....	3 & 3½	2½* 2½
Yellow pine.....	4c.	2½* 2½
White pine.....	3½	3½
White-pine deck.....	4½	4½
Oakum.....	7½	6½
Pitch, per bbl.....	2.50	2.25
Carpenter- and caulkers.....	3.00	3.00
Joiners.....	2.75 & 3.00	2.75 & 3.00
	2.25*	2.25*
Fasteners.....	2.50 & 2.75	2.50 & 2.75
Laborers.....	2.00	2.00
Black spikes.....	1874.	1894.
Galv. ".....	3½c.	3½c.
Black iron.....	5c.	4½c.
Galv. ".....	2c.	1½c.
Galv. ".....	3½c.	2.60
" nails.....	4½	4c.

[\* In pencil in copy.]

[† In red ink in copy.]

1234

*Notice of Submission of Decree.*

Filed March 13, 1896.

In the Supreme Court of the District of Columbia, Holding a  
U. S. District Court.

CHARLES BURNETT <i>et al.</i> , Libellants,	} No. 379.
<i>vs.</i>	
CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR, Respondents.	

Messrs. Nathaniel Wilson and Job Barnard, proctors for respondents.

GENTLEMEN: Please take notice that by direction of Mr. Justice Cox, holding the district court, I shall, on Monday morning next, the 16th instant, at 10 o'clock, upon the coming in of the court, or so soon thereafter as counsel can be heard, submit a decree in the above-entitled cause, a copy of which I submit herewith for your perusal.

You will observe that the amount of the value of the vessel is left blank.

March 13, 1896.

RANDALL HAGNER,  
*Proctor for Libellants.*

1235

*Final Decree.*

Filed March 23, 1896.

In the Supreme Court of the District of Columbia, Holding a United  
States District Court for said District.

CHARLES BURNETT <i>et al.</i> , Libellants,	} District Court. 379.
<i>vs.</i>	
CHARLES G. SMITH and CHARLES G. SMITH, JR., Respondents.	

And now, to wit, this 23rd day of March, A. D. 1896, these causes having been fully heard upon the libel and amendments thereto, exhibits and answer and exhibits thereto, and the cross-bill and pleadings thereon, and all the proofs, and after taking testimony on behalf of libellants in open court on the market value, and arguments of the advocates of the respective parties, and due deliberation being had, and the special commissioner to assess the damages having made his report, and the exceptions thereto filed on both sides having been argued, it is thereupon by the court ordered, adjudged, sentenced, and decreed that all the exceptions filed by either party be, and they are hereby, overruled, so far as they are inconsistent with this decree, and the court now proceeding to award a proper sum as the value of said vessel, and being of the opinion that according to the plan adopted by the commissioner said commissioner made too small an estimate as the value of the vessel *Ellen Tobin*,

and that the libellants duly recover of the respondents,  
 1236 Charles G. Smith and Charles G. Smith, Jr., the sum of  
 \$9,260.00, of which the sum of eight thousand dollars was  
 the market value of said schooner at the time of her injury and  
 wrecking, on August 6th, 1893, and the remainder for interest to this  
 date, besides the following sums expended by the libellants, to wit,  
 the sum of \$1,063.12 allowed by the commissioner for the taking  
 out of cargo (after deducting, as in the exhibit to the commissioner's  
 report, allowances for yawl-boat, compasses, &c.), with interest from  
 the 5th day of November, 1893, the date of the payment for taking  
 out said cargo to the date of this decree, amounting to one hundred  
 and fifty-four dollars and ninety-seven cents, with their costs of suit,  
 to be taxed by the clerk, and that libellants have execution therefor  
 and for all of said sums if the respondents do not appeal within the  
 usual time and supercede this decree as provided by law, and,  
 further, that the cross-bill filed herein be dismissed at the cost of the  
 respondents, who filed the same.

W. S. COX, J.

*Appeal.*

Filed April 4, 1896.

In the Supreme Court of the District of Columbia.

CHARLES BURNETT <i>et al.</i>	} No. 379. District Court.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

Now come the respondents and appeal to the Court of Appeals  
 from the decree in this cause.

NATH'L WILSON AND  
 EDWARDS & BARNARD,  
*Proctors for Respondents.*

1237 *Order Allowing Appeal and Fixing Bond.*

Filed April 4, 1896.

In the Supreme Court of the District of Columbia, Holding a Dis-  
 trict Court of the United States for said District.

CHARLES BURNETT <i>et al.</i>	} No. 379. District Court.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

Now come the respondents herein and pray an appeal to the Court  
 of Appeals of the District of Columbia from the decree rendered  
 herein, which appeal is hereby allowed this 4th day of April, 1896,  
 and, proctors for both parties being present, the amount of the appeal  
 bond, to operate as a supersedeas, herein is hereby fixed at the sum  
 of fifteen thousand dollars.

W. S. COX, J.

*Order for Citation.*

Filed April 4, 1896.

In the Supreme Court of the District of Columbia, the 4th Day of April, 1896.

CHARLES BURNETT <i>et al.</i>	} 379. District Court.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

The clerk of said court will issue citation in this cause for service on the libellants, the appellees herein.

NATHANIEL WILSON AND  
EDWARDS & BARNARD,

*Proctors for Respondents, the Appellants Herein.*

1238 In the Supreme Court of the District of Columbia.

CHARLES BURNETT, Suing on His Own Behalf, and said Charles Burnett and Charles G. Endicott, Executors of the Last Will and Testament of Harriet E. Burnett, Deceased; Jane Eliza Allison, Samuel C. Allison, and Edward S. Allison, Executors of the Last Will and Testament of Michael S. Allison, Deceased; Henrietta W. Allison, Richard C. Washburn, Michael De Motte Vreeland, Charles G. Endicott, on His Own Behalf, and Charles G. Endicott and Mordecai T. Endicott, Executors of the Last Will and Testament of Thomas D. Endicott, Deceased; Drucilla M. Cox, Charlotte A. Rogers, John Van Buskirk, William J. Boothe, Ephriam P. Emson, Executor of the Last Will and Testament of Christian D. Emson, Deceased; William B. Lloyd, Michael Tobin, on His Own Behalf, and Michael Tobin and John Riley, Executors of the Last Will and Testament of Peter J. Connolly, Deceased, Owners of the Schooner "Ellen Tobin,"

*vs.*

CHARLES G. SMITH and CHARLES G. SMITH,  
JUNIOR

In Admiralty. No.  
379, District Court  
Docket 1.

The President of the United States to Charles Burnett, suing on his own behalf, and said Charles Burnett and Charles G. Endicott, executors of the last will and testament of Harriet E. Burnett, deceased; Jane Eliza Allison, Samuel C. Allison, and Edward S. Allison, executors of the last will and testament of Michael S. Allison, deceased; Henrietta W. Allison, Richard C. Washburn, Michael De Motte Vreeland, Charles G. Endicott, on his own be-

half, and Charles G. Endicott and Mordecai T. Endicott, executors of the last will and testament of Thomas D. Endicott, deceased; Drucilla M. Cox, Charlotte A. Rogers, John Van Buskirk, William J. Boothe, Ephriam P. Emson, executor of the last will and testament of Christian D. Emson, deceased; William B. Lloyd, Michael Tobin, on his own behalf, and Michael Tobin and John Riley, executors of the last will and testament of Peter J. Connolly, deceased, owners of the schooner "Ellen Tobin," Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 4th day of April, 1896, wherein Charles G. Smith and Charles G. Smith, Junior, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 4th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 4th day of April, 1896.

RANDALL HAGNER,  
*Attorney for Appellees.*

1239

*Memorandum.*

1896, April 13.—Bond for appeal filed.

*Power of Attorney.*

Filed April 13, 1896.

Know all men by these presents that I, Charles G. Smith, of Chicago, Illinois, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Charles G. Smith, Jr., of Washington, D. C., my true and lawful attorney, for me and in my name, place, and stead to take charge of and manage all my affairs, and to that end I authorize and empower him—

To sign my name to checks and drafts for the purpose of drawing funds standing to my credit in any bank or trust company in the United States of America.

To endorse my name upon any checks or drafts payable directly or by endorsement to me for the purpose of collecting or negotiating the same, and to receive and receipt for the moneys.

To sign my name for the purpose of making any promissory notes or other obligations in my name, and to sell, discount, or negotiate the same when made, and to receive and receipt for the proceeds.

To endorse my name upon any promissory notes and payable

directly or by endorsement to me, and to sell, discount, collect, or negotiate the same, and to receive and receipt for the proceeds  
 1240 To sign my name for the purpose of selling, transferring, or pledging any shares of stock standing in my name upon the books of the Potomac Stone Company.

To vote in my name and stead at any regular or special meeting of the stockholders of the Potomac Stone Company the stock standing in my name upon the books of the said company.

To make, execute, and deliver in my name and stead any bond or obligation to the United States of America or other obligee conditioned upon the faithful performance of any contract entered into by Chas. G. Smith & Son.

To make, execute, and deliver in my name and stead any bond or obligation to the United States of America conditioned upon the faithful prosecution of any appeal or for any other purpose arising from any litigation in any courts of the United States or the supreme court of the District of Columbia or in the Court of Appeals of the District of Columbia in which I or Charles G. Smith & Son may be a party litigant.

In general, to collect, compromise, adjust, and release any claim which I may own or may exist against me.

Giving and granting to my said attorney full power and authority to do all and every act needful and necessary in the premises (under statutory or executive regulation or otherwise) as fully as I could were I present, hereby ratifying and confirming all that may be done by my said attorney by virtue hereof.

In witness whereof I have hereunto set my hand and seal this 27th day of September, A. D. 1895.

CHARLES G. SMITH. [SEAL]

Signed in the presence of—  
 WAYNE SMITH.

1241 DISTRICT OF COLUMBIA, *To wit* :

Personally appeared before me Charles G. Smith, who, being personally well known to me to be the person who executed the foregoing letter of attorney, acknowledged the same to be his act and deed.

Witness my hand and official seal the twenty-eight day of September, A. D. 1895.

FREDERICK GRAY,  
*Notary Public.*

[SEAL]



*Stipulation.*

Filed April 23, 1896.

In the Supreme Court of the District of Columbia, Holding the  
United States District Court.

CHARLES BURNETT <i>et al.</i>	} In Admiralty. No. 379.
<i>vs.</i>	
CHARLES G. SMITH <i>et al.</i>	

It is hereby, this 21st day of April, A. D. 1896, stipulated and agreed between the counsel for the respective parties that the title to the schooner Ellen Tobin was at the time of her injury at Smith's dock, in Georgetown, D. C., in the libellants, and that in the preparation of the record for the Court of Appeals the proofs of such ownership, filed as exhibits to the testimony, be omitted from 1242 said record, such as the wills and certificates thereto and notices of sales and advertisements; this also to hold good for any further appeal.

RANDALL HAGNER,  
*Proctor for Charles Burnett et al.*  
NATHANIEL WILSON AND  
EDWARDS & BARNARD,  
*Proctors for Appellants.*

1243 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } *ss:*  
*District of Columbia,*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 1242, inclusive, to be true copies of originals in cause number 379, admiralty, wherein Charles Burnett and others are libellants and Charles G. Smith and Charles G. Smith, Jr., are respondents, as the same appear upon the files and records of said court.

Seal Supreme Court of the District of Columbia. In testimony whereof I hereunto set my hand and affix the seal of said supreme court this 21st day of May, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 582. Charles G. Smith and Charles G. Smith, Junior, appellants, *vs.* Charles Burnett *et al.* Court of Appeals, District of Columbia. Filed May 22, 1896. Robert Willett, clerk.



692 In the Court of Appeals of the District of Columbia, October Term, 1896.

CHARLES G. SMITH *et al.* }  
*vs.* } No. 582. In Admiralty.  
 CHARLES BURNETT *et al.* }

The schooner "Ellen Tobin."

It is hereby stipulated and agreed that the scale of the map prepared by Henry W. Brewer and marked "Libellants' Exhibit Brewer No. 7" and found on page 290 of the Record has been reduced to one-half its original size and is now at a scale of about ten feet to one inch.

EDWARDS & BARNARD,  
*For Appellants.*  
 RANDALL HAGNER,  
*Proctor for Appellees.*

Endorsed: Court of Appeals D. C., April term, 1896. No. 582. Charles G. Smith *et al.*, appellants, *vs.* Charles Burnett *et al.* Stipulation to effect that Exhibit Brewer No. 7 is at a scale of ten feet to one inch. Court of Appeals, District of Columbia. Filed Sep. 22, 1896. Robert Willett, clerk.

693 WEDNESDAY, October 14th, A. D. 1896.

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR, }  
 Appellants, } No. 582.  
*vs.* }  
 CHARLES BURNETT *et al.* }

On motion of Mr. Randall Hagner, one hour additional time is allowed counsel in the argument of the above-entitled cause. The argument in the above-entitled cause was commenced by Mr. Job Barnard, attorney for the appellants, and was continued by Mr. Randall Hagner, attorney for the appellees.

THURSDAY, October 15th, A. D. 1896.

CHARLES G. SMITH and CHARLES G. SMITH, JR., }  
 Appellants, } No. 582.  
*vs.* }  
 CHARLES BURNETT *et al.* }

The argument in the above-entitled cause was continued by Mr. Randall Hagner, attorney for the appellees, and was concluded by Mr. Nathaniel Wilson, attorney for the appellants.

694 CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR, }  
Appellants, } No. 582.  
vs.  
CHARLES BURNETT *et al.* }

*Opinion.*

Mr. Chief Justice ALVEY delivered the opinion of the court :

This case is in admiralty, *in personam*, and the libel was filed by the appellees against the appellants for an alleged injury to their vessel, the schooner "Ellen Tobin," while moored in berth at the wharf of the appellants on the bank of the Potomac river, at Georgetown, D. C., for the purpose of being loaded from said wharf, *by and for the appellants*. The injury complained of is alleged to have been occasioned by the negligent allowance by the appellants of a dangerous rock on the bed of the river within the limits of the berth at the wharf to which the vessel was invited to take position, and which dangerous obstruction was unknown to the master of the vessel, and who acted upon the assurance of the appellants, by their agent, that the depth of the water in the berth in front of the wharf was sufficient, and that the berth was safe for the loading of the vessel from the wharf.

The material facts alleged in the libel and shown in proof appear to be these : The appellants are lessees of the wharf, and water rights extending to the channel of the river, and the berth assigned to and taken by the schooner for purpose of loading was in front of the wharf and within the leased premises. The appellants were engaged in the business of crushing and shipping stone from the wharf to different points, principally to Fortress Monroe ; and the schooner had been brought up the river, by pre-arrangement with a ship broker in Georgetown, for the purpose of being loaded by the appellants at their wharf with crushed stone, to be taken to Fortress Monroe, in Virginia, to be used in Government work at that place.

There appears to be no doubt of the fact that the vessel was staunch and in good repair, though she had been built and engaged in the coasting trade for a good many years. She was a three-masted schooner, of about 600 tons capacity, and 419 tons net registry, and was 136 feet long and 32 feet wide. She was registered at the New York custom-house as a coasting vessel of the United States. She was owned by the appellees at the time of the injury complained of.

It also appears that the vessel was sunk on the 6th of August, 1893, as she was moored in the berth at the wharf, while receiving her cargo of crushed stone from the wharf, by means of a chute extended from the wharf to the hatchway of the vessel. The vessel was about two-thirds loaded, having received about 400 tons of her cargo, before signs were discovered of her distressed condition. She was then taking water so rapidly that the pumps could not relieve her, nor could the extra assistance employed by the master avail to save her from breaking and sinking in the berth. The work of loading was stopped on Saturday evening, with the intention of re-

suming the work of loading on the following Monday morning; and the captain of the vessel, at the time of stopping work on Saturday, made soundings around the vessel, and supposed that she was then lying all right. But on Sunday morning it was discovered that there was so much water in her that she could not be relieved by her pumps; and by 5 o'clock of the afternoon of that day she had filled with water, and broke in the middle, and sank in her berth, where she remained, with her cargo under water, until the 1st of November, 1893, when the stone was pumped out of her, and she was then condemned as worthless, and was afterwards sold at auction for \$25 to one of the owners.

The appellants, in their answer to the libel, deny all negligence imputed to them by the appellees, and insist that they are in no way responsible for the disaster to the vessel. They also filed a cross-libel, claiming \$2,700 for damages caused by the fault of the appellees in allowing the vessel to sink in the river in front of their wharf, and to remain there for an undue time. The appellees filed a replication to the answer, and an answer to the cross-libel. It was upon this state of allegation and response that a large mass of proof was taken; the most of it being very conflicting, especially that relating to the question of negligence mutually charged, and as to the value of the vessel.

The principal question in the court below was, and it is the principal question here, who was responsible for the cause of the injury to the vessel—by whose negligence, if there was negligence, was it that the damage was produced?

By the preliminary decree of August 27, 1895, it was decreed and sentenced that the libellants were the owners of the schooner 695 "Ellen Tobin" at the time of the injury to her complained of in the libel, and that the respondents, Charles G. Smith and Charles G. Smith, Jr., were solely liable for such injury and damage thereby resulting to the libellants in the original libel, and that the latter were not liable for any damages in the cross-libel. It was further decreed and sentenced that the first of the said causes, that arising on the original libel, be referred to a special commissioner with directions to ascertain and report the amount of damages to which the libellants were entitled, consisting of the value of the vessel immediately prior to the injury, together with the reasonable expenses of raising and removing said vessel and said wreck; and further, that the commissioner should consider the evidence already in the record, bearing upon the questions referred to him, and such additional evidence as either party might think proper to introduce before him, and report with reasonable speed.

Under this reference, the special commissioner, upon the evidence already in the record, and after hearing further testimony on each side, and considering the same, made his report to the court on January 21, 1896, whereby he found the amount of damages to which the libellants were entitled under the decree of the court, to be \$7,063.12, estimating the value of the vessel at \$6,000.

To this report both parties, libellants and respondents, excepted for several reasons assigned; and upon hearing the exceptions the

court allowed the libellants to produce further testimony in open court; after which the cause came on for final hearing and decree, and on the 23d of March, 1896, the court decreed that the libellants were entitled to recover \$10,478.09, being \$8,000 for value of the vessel, with interest on that sum from August 6, 1893, to the date of the decree, and \$1,063.12 for expenses of raising vessel and cargo, after allowing credit for value of wreck and other things and interest on that sum from November 5, 1893, to date of decree. It is from this decree and sentence that respondents have appealed.

We shall not go into any detailed statement of the evidence. From a careful examination of the entire record, we are quite satisfied that the conclusions reached by the learned judges below, and embodied in the decrees referred to, are in all respects fully warranted by the evidence. We think it clearly established by the decided preponderance of the evidence, that the injury sustained by the vessel was caused by the rock in the bed of the river, within the berth assigned to the vessel, and that such obstruction was negligently allowed to exist by the appellants, and that there was negligence and want of due care on their part in representing to the master of the vessel that the depth of the water in the berth was sufficient to float the vessel, and to maintain her in safety while being loaded from the wharf. And there is an entire failure of evidence to establish the fact, as attempted to be shown by the appellants, that there was want of due care on the part of the master, and a failure to exercise proper supervision for the safety of the vessel while she was moored at the wharf for the purpose of being loaded.

Such, then, being the case on the facts, what are the legal principles that properly apply to it?

It has long since been settled that the definition of the term "*torts*," when used in reference to admiralty jurisdiction, is not confined to wrongs or injuries committed by actual or direct force. It includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. It is a rule of maritime law, from the earliest times, "that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages." Emerigon, vol. 1, p. 417. "Hence, the impinging on an anchor or other *injurious impediment negligently left in the way*, has always been considered as coming within the category of maritime torts, having their remedy in the courts of admiralty." Phil. Wilm. & Balt. R. R. Co. v. Phil. Havre de Grace Steam Towboat Co., 23 How., 209, 216.

In the case of *Carleton v. Franconia Iron and Steel Co.*, 99 Mass., 216, the material facts were not unlike those of the present case. There the facts were, that the defendants built, owned and occupied a wharf extending below low-water mark into public navigable waters, and excavated and used a dock in front of the same, as a berth for vessels, bringing cargoes of iron and coal to their works on and adjoining the wharf, to lie and discharge; that there was, and always had been, within the line of this excavation, and in front of a part of the wharf which was to all appearances suitable for vessels to lie at when discharging their cargoes, a large rock,

concealed under the water and dangerous to such vessels, the existence and dangerous nature of which were known to the defendants, but not to the plaintiffs; that the plaintiffs' vessel came to the wharf by procurement of the defendants, bringing a cargo of iron to them under a verbal charter between the parties, and, while lying at this part of the wharf, settled down with the ebb of the tide upon the rock, without any negligence of the plaintiffs, or of any one employed by them, and was broken in and bilged. In that case, it was held by the court, Mr. Justice Gray delivering the opinion, "that it was immaterial whether the danger had been created or increased by the excavation made by the defendants, or had always existed, if they, knowing of its existence, neglected to remove it or to warn those transacting business with them against it. Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners, or their agents or servants, was put in a place apparently adopted to its reception, but known by the defendants to be unsafe."

And in a subsequent case, in the same court, that of *Nickerson v. Tirrell*, 127 Mass., 236, it was held that the owner or occupant of a wharf is liable to a person, who, by his invitation, *express or implied*, and in the exercise of due care, places a vessel in the dock, for an injury caused to the vessel by any defect in the dock or by its unsafe condition, which the owner or occupant negligently causes or permits to exist, and the existence of which he knows, or ought, in the exercise of ordinary care, to know:—citing as authorities for the principle stated, the cases of *Wendell v. Baxter*, 12 Gray, 494; *Carleton v. Franconia Iron and Steel Co.*, *supra*; *Thompson v. Northeastern Railway*, 2 B. & S., 106; *Mersey Docks, v. Gibbs*, L. R. 1 H. L., 93. In that case, there was evidence that the owner of the wharf directed the master where to place the vessel, and, on the master asking if it was a proper place to lay the vessel, he received for reply, that it was all right, there was no trouble about the dock; and it was held, that the defendant was not entitled to have the jury instructed that, if the master placed his vessel there without previous examination or measurement, the defendant was not responsible.

Upon the same principle, it was held in the case of *Barber v. Abendroth*, 102 N. Y., 406, that the owner of a wharf is liable for an injury to a vessel lawfully using it, occasioned by an obstruction in the river bottom adjoining it, known to him, but not to the master of the vessel,—quoting and following the case of *Sawyer v. Oakman*, 1 Low., 134, and same case affirmed in 7 Blatchf., 290.

This question of the liability of a wharfinger for negligent injuries to vessels at the wharf, has frequently arisen in the Federal courts of the country, and it has been uniformly ruled the same way, and in accordance with the principle we have just stated. Among the many cases that might be referred to, we will only men-



tion those of *O'Rourke v. Peck*, 40 Fed. Rep., 907; *Christian v. Van Tassel*, 12 Fed. Rep., 884; *The Stroma*, 50 Fed. Rep., 556, 561; *Penn. R. R. Co. v. Atha*, 22 Fed. Rep., 920; *Leonard v. Decker*, 22 Fed. Rep., 741; *Union Ice Co. v. Crowell*, 55 Fed. Rep., 87.

The evidence in this case, as we have already stated, leaves no doubt of the fact that there was a large rock in the bed of the river within the berth occupied by the vessel in front of the wharf, and that such rock was the cause of the breaking and sinking of the vessel. But it is argued for the appellants, that assuming such to be the fact, yet the evidence is insufficient to show knowledge on the part of the appellants of the existence of such rock in the berth, or of its dangerous character; and that, without such knowledge, there is nothing to fix upon them any such negligence as would render them responsible for the injury. But it would be difficult to conclude, upon the evidence in this record, that the appellants did not have knowledge of the existence of the rock and of its dangerous nature. They had been for some years in the use of the wharf, and of this particular berth; and it appears that not a great while before the occurrence of the accident in question, a vessel, while being loaded with stone from the same wharf, and occupying a berth in front of it, struck upon a rock and was injured, and this fact was brought distinctly to the knowledge of the appellants. And subsequently the berth was dredged, and rock was found upon the bottom that was not removed. But let the fact as to actual knowledge be as it may, it would seem to make no difference upon the question of liability of the appellants. They were bound to know the condition of the berth before they represented it to be safe, or invited the vessel to be moored therein. *Nickerson v. Tirrell*, *supra*.

In the cases of the *Mersey Docks v. Gibbs* and *v. Pierce*, 11 Ho. Lords Cas., 686, there were two cases that arose out of the same transaction. A ship called the "*Sierra Nevada*," in entering, or endeavoring to enter, one of the docks of the appellants, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were both damaged; and two actions were brought against the appellants, one by the owner of the cargo, and the other by the owners of the ship. In those cases, among other defenses, the want of knowledge of the obstruction by the appellants was relied on; but in both cases the Exchequer Chamber held that the appellants were liable; and upon appeal to the House of Lords, and after a most exhaustive discussion, both judgments were affirmed. It was there laid down as clear law, that persons who have a duty to perform, and who may be made responsible for injuries if they know of the causes of mischief which in the discharge of that duty they ought to remedy, are equally responsible *if they negligently remain ignorant of those causes of mischief*, and so leave them unremedied. See, also, the case of *Dock and Harbor Board v. Penhallow*, in Exchequer Chamber, 7 H. & N., 229, 236.

The appellants have cited, and relied much upon, the case "*The Calliope*" (1891), App. Cas., 11, as to the circumstances under which a wharfinger will not be held responsible for injuries to vessels while lying at a wharf. But clearly that case has no application to the

present. In that case there was no representation or assurance as to the depth of the water at the wharf, and there was no invitation to enter the berth; and the court expressly found that the grounding of the vessel was caused by the negligence of the master and pilot, and therefore held the wharfinger not liable.

The appellants being liable for the injury, the next question is, What is the extent of the recovery to which the appellees are entitled? They are entitled to full indemnity for their loss, provided no part of that loss has been occasioned by the failure of the appellees, their agents or servants, to exercise ordinary skill and diligence to stay or prevent the increase of loss after the occurrence of the accident. *The Baltimore*, 8 Wall., 377. The evidence would seem to make it clear that no ordinary skill or effort on the part of the master of the vessel, or of the appellees, the owners, could have been exercised effectively to save the vessel from total loss after she had broken and sunk, or after it was found that she had taken so much water that she could not be relieved by the use of her pumps. After she had sunk, nothing remained to be done but to get out the cargo, and to remove the wreck, which the owners were required to do under the statute. Under the circumstances of the case, we see no ground for holding that the injury was increased or the damages in any manner enhanced by the delay in attempting to raise and remove the vessel. And taking into consideration all the circumstances of the case, and comparing the conflicting evidence in respect to the value of the vessel at the time of the injury sustained, were are of opinion that the court below has not exceeded reasonable limits of indemnity, according to settled principles of law, in the sums awarded to the appellees by its final decree and sentence of the 23d day of March, 1896.

The cross-libel filed by the appellants was dismissed by the court below, and in so disposing of that libel and claim we perceive no error. The appellees were not in fault in allowing the vessel to sink, as charged in the cross-libel, and they appear to have acted with reasonable diligence, under the special circumstances of the case, in providing for raising and removing the vessel from the wharf of the appellants.

Upon the whole, we are of opinion that the decree of August 27, 1895, and the final decree of March 23, 1896, should be affirmed; and it is so ordered.

*Decrees affirmed, with costs.*

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TUESDAY, April 6th, A. D. 1897.

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR, Appellants,  
vs.  
CHARLES BURNETT *et al.*

No. 582, April Term, 1897.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by

counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court of August 27, 1895, and the final decree of March 23, 1896, in this cause be, and the same are hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

April 6, 1897.

FRIDAY, April 9th, A. D. 1897

CHARLES G. SMITH and CHARLES G. SMITH, JUNIOR,	} No. 582.
Appellants,	
vs.	
CHARLES BURNETT <i>et al.</i>	

On motion of Mr. Job Barnard, attorney for the appellants in the above-entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving supersedeas bond in the sum of eighteen thousand dollars.

698 Know all men by these presents that we, Charles G. Smith and Charles G. Smith, Junior, of the city of Washington, in the District of Columbia, as principals, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Charles Burnett, Charles Burnett and Charles G. Endicott, executors of Harriett E. Burnett; Jane Eliza Allison, Samuel C. Allison, and Edward S. Allison, executors of Michael S. Allison; Henrietta W. Allison, Richard C. Washburn, Michael De Motte Vreeland, Charles G. Endicott; Charles G. Endicott and Mordecai T. Endicott, executors of Thomas D. Endicott; Drucilla M. Cox, Charlotte A. Rogers, John Van Buskirk, William J. Boothe; Ephraim P. Emson, executor of Christian D. Emson; William B. Lloyd, Michael Tobin; Michael Tobin and John Riley, executors of Peter J. Connolly, in the full and just sum of eighteen thousand (18,000) dollars, to be paid to the said Charles Burnett and others, as aforesaid, being the libellants in No. 379, in admiralty, in the supreme court of the District of Columbia, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of April, in the year of our Lord one thousand eight hundred and ninety-seven (1897).

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court, between said Charles Burnett and others, libellants, and said Charles G. Smith and Charles G. Smith, Junior, decrees were rendered against the said Charles G. Smith and Charles G. Smith, Junior, and the said Charles G. Smith and Charles G. Smith, Junior, having obtained an appeal in open court to reverse the said decrees in the aforesaid suit, and a citation directed to the said Charles Burnett and others, libellants, as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Charles G. Smith and Charles G. Smith, Junior, shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void ; else to remain in full force and virtue.

CHARLES G. SMITH.	[SEAL.]
CHARLES G. SMITH, JR.	[SEAL.]
FIDELITY AND DEPOSIT COM-	
PANY OF MARYLAND,	[SEAL.]
By JAMES S. EDWARDS,	[SEAL.]
Of Local Board.	

[Seal of the Fidelity & Deposit Company of Maryland.]

Sealed and delivered in the presence of—

Attest : J. SPRIGG POOLE, *Agent*.

Approved by—

R. H. ALVEY, *Chief Justice*.

[Endorsed :] No. 582. Charles G. Smith *et al.* vs. Charles Burnett *et al.* Supersedeas bond on appeal to S. C. U. S. Court of Appeals, District of Columbia. Filed Apr. 19, 1897. Robert Willett, clerk.

699 *Copy of Resolutions Authorizing the Execution of Certain Surety Bonds for the Fidelity and Deposit Company of Maryland in the District of Columbia.*

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company, in Baltimore, Md., on the first day of April, 1896, the following resolutions were unanimously adopted, to wit :

Whereas the Fidelity and Deposit Company of Maryland has established a general agency in the District of Columbia, and has been authorized by the insurance department of said District to do business therein ; and

Whereas it is often necessary, in order to facilitate the business of the company in said District, to have bonds in certain cases executed upon application for same : therefore be it

Resolved, That either James S. Edwards, William A. Gordon, Benjamin F. Leighton, or H. E. Davis, all of the city of Washington, District of Columbia, be, and they are hereby, authorized to execute and deliver for and on behalf of the said Fidelity and Deposit Company of Maryland all bonds required in judicial proceedings in any and all courts in said District of Columbia and in the United States circuit and district courts in said District, to wit, bonds for executors, administrators, trustees, receivers, assignees, guardians, committees for lunatics, in replevin cases, attachment cases, injunction cases, appeal cases bonds for security for costs, and any and all other bonds required to be given by order or decree of any court of law or equity of the District of Columbia or the United States circuit

and district courts for said District, the same to be attested by the signature of J. Sprigg Poole, general agent for the company, who shall attach the seal of said company to the undertaking or bond so executed; and any such bond so executed shall be binding upon the said Fidelity and Deposit Company of Maryland to all intents and purposes as fully as if done by the regular officers of the company in their own proper persons in its behalf,

We, Edwin Warfield, president, and Herman E. Bosler, secretary, of the Fidelity and Deposit Company of Maryland, hereby certify that the foregoing is a true copy taken from the records of proceedings of the board of directors of the Fidelity and Deposit Company of Maryland.

In testimony whereof we have hereunto subscribed our names as president and secretary respectively and affixed the corporate seal of the Fidelity and Deposit Company of Maryland this 20th day of April, A. D. 1897.

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

EDWIN WARFIELD, *President*.

H. E. BOSLER, *Secretary*.

STATE OF MARYLAND, } ss:  
City of Baltimore, }

On this 20th day of April, A. D. 1897, before the subscriber, a notary public of the State of Maryland in and for the city of Baltimore, duly commissioned and qualified, came Edwin Warfield, president, and Herman E. Bosler, secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in and who executed the preceding instrument, and they each acknowledged the execution of the same, and, being by me duly sworn, severally and each for himself depose and saith that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

[Seal of Fred S. Axtell, Notary Public, Baltimore, Md.]

FRED S. AXTELL,  
*Notary Public*.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 21, 1897. Robert Willett, clerk.

700 UNITED STATES OF AMERICA, ss.:

To Charles Burnett, suing on his own behalf, and said Charles Burnett and Charles G. Endicott, executors of the last will and testament of Harriet E. Burnett, deceased; Jane Eliza Allison, Samuel C. Allison, and Edward S. Allison, executors of the last will and testament of Michael S. Allison, deceased; Henrietta W. Allison, Richard C. Washburn, Michael De Motte Vreeland, Charles G. Endicott, on his own behalf, and Charles G. Endicott and Mordecai T. Endicott, executors of the last will and testament of Thomas D. Endicott, deceased; Drucilla M. Cox, Charlotte A. Rogers, John Van Buskirk, William J. Boothe; Ephriam P. Emson, executor of the last will and testament of Christian D. Emson, deceased; William B. Lloyd, Michael Tobin, on his own behalf, and Michael Tobin and John Riley, executors of the last will and testament of Peter J. Connolly, deceased, owners of the schooner "Ellen Tobin," Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Charles G. Smith and Charles G. Smith, Junior, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

R. H. ALVEY,

*Chief Justice of the Court of Appeals of the District of Columbia.*

Service accepted Ap'l 21st, 1897.

RANDALL HAGNER,

*Solicitor for Appellees.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 21, 1897. Robert Willett, clerk.

701 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 700, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Charles G. Smith and Charles G. Smith, Junior, appellants, vs. Charles Burnett *et al.*, No. 582, April term, 1897, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Seal Court of Appeals, District of Columbia. Court of Appeals, at the city of Washington, this 1st day of May, A. D. 1897.

ROBERT WILLETT,

*Clerk of the Court of Appeals of the District of Columbia.*

Endorsed on cover: Case No. 16,590. District of Columbia Court of Appeals. Term No., 377. Charles G. Smith and Charles G. Smith, Junior, appellants, vs. Charles Burnett, suing on his own behalf and said Charles Burnett and Charles G. Endicott, executors of Harriet E. Burnett, deceased, *et al.* Filed May 19, 1897.





FILED

DEC 10 1898

JAMES M. MCKENNEY,  
Clerk.

No. 112

*Or. of Wilson v. Benedict for*  
*Copyright*

Supreme Court of the United States.  
*Filed Dec. 10, 1898.*  
October Term, 1898.

No. 112.

Charles G. Smith and Charles G. Smith, Jr., Appellants,

*vs.*

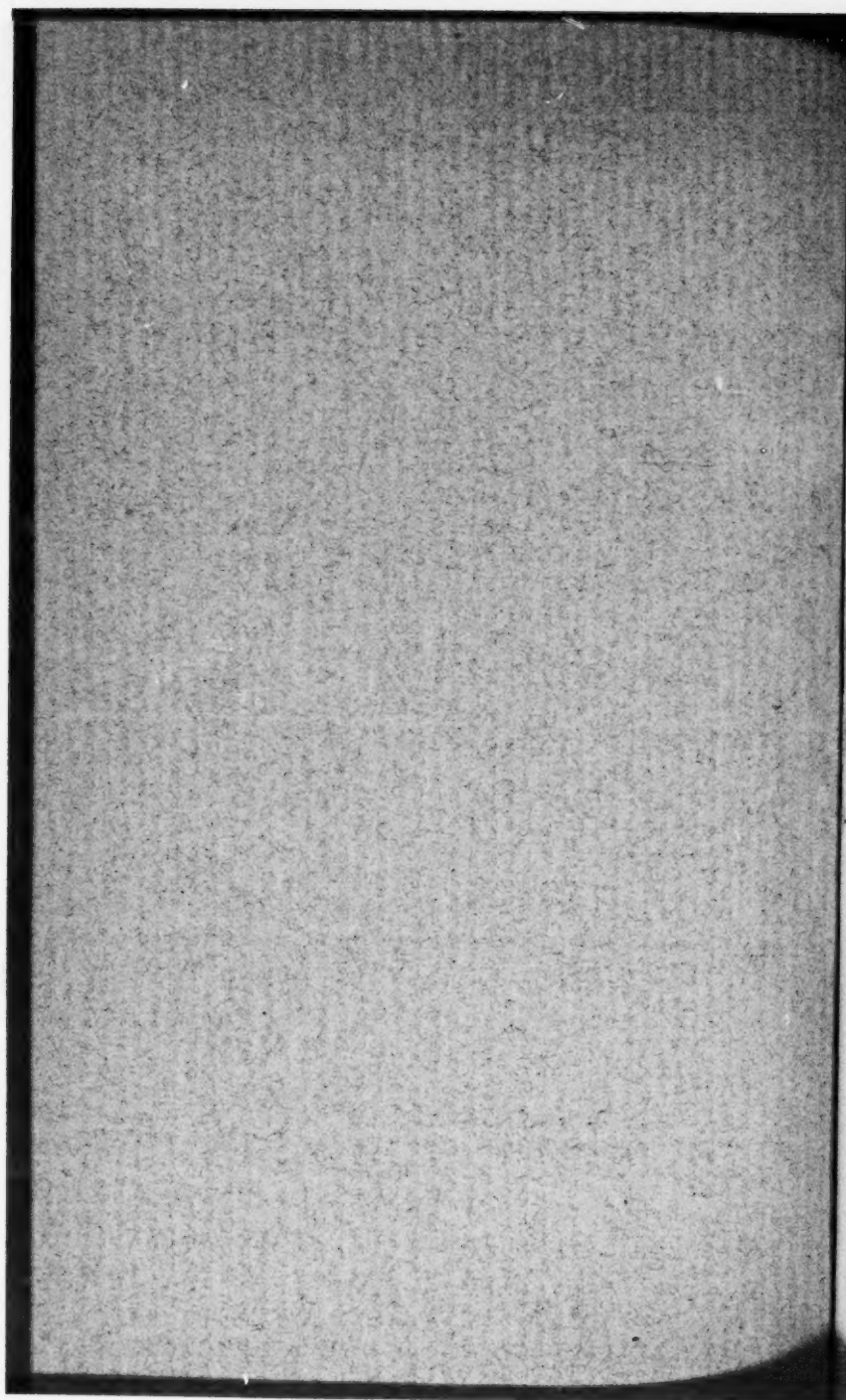
Charles Burnett, suing on his own behalf,  
Charles Burnett and Charles G. Endicott, etc., et al.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

**BRIEF AND POINTS FOR APPELLANTS.**

JAMES S. EDWARDS,  
JOB BARNARD,  
*Proctors for Appellants.*

NATHL. WILSON,  
ROBERT D. BENEDICT,  
*of Counsel.*



# Supreme Court of the United States

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CHARLES G. SMITH and CHARLES G. SMITH, Jr.,  
*Appellants,*

*v/s.*

CHARLES BURNETT suing on his own behalf and said CHARLES  
BURNETT and CHARLES G. ENDICOTT, Executors of HARRIET  
E. BURNETT, deceased, and others.

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## POINTS FOR APPELLANTS

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EDWARDS & BARNARD,  
*Proctors for Appellants.*

NATHANIEL WILSON,  
ROBERT D. BENEDICT,  
*Advocates.*

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NEW YORK:

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1868



# Supreme Court of the United States

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CHARLES G. SMITH and CHARLES G.  
SMITH, JR.,

Appellants,

*vs.*

Brief for  
Appellants.

CHARLES BURNETT, suing on his own  
behalf, and said CHARLES BURNETT  
and CHARLES G. ENDICOTT, Execu-  
tors of HARRIET E. BURNETT, De-  
ceased, *et al.*

This is an appeal by the respondents from a decree of the Court of Appeals of the District of Columbia, affirming a decision of the Supreme Court of the District of Columbia, sitting in Admiralty, in favor of the libellants, against the respondents.

The libel was filed by the owners of the schooner *Ellen Tobin*, against the respondents, who were the owners of a wharf at Georgetown. It was brought to recover the damages occasioned to the schooner by reason of the fact that while lying abreast of the respondents' wharf, engaged in loading crushed stone, she settled upon a rock, which caused her to leak and sink. The occurrence took place in August, 1893.

### Statement of Facts.

In order to save this Honorable Court the labor of an examination of this Record of over seven hundred pages, we have endeavored to bring together in this brief all the facts, and all the evidence bearing on those facts, which it will be important to consider. There were other questions involved in the case as to which masses of testimony were taken. For instance, the claim of the libellants being that there was a rock in the river, in front of the respondents' wharf, which was so near the surface of the water that the schooner, when only half loaded, settled at low tide upon that rock and was injured, the respondents denied that there was any rock so near the surface of the water as the libellants claimed; and they accounted for the settling of the schooner upon the rock by the allegation that the schooner was leaking, and was not pumped. This issue we have preferred to pass by, because there are, as it appears to us, controlling reasons which call for a reversal of this decree, even assuming that the rock in question was as high as the libellants have alleged.

A great deal of testimony was taken in attempting to fix with accuracy the locality and the description of the point of rock. This evidence also may be disregarded, because we will assume the rock to have been as the libellants claimed it.

So, also, great masses of testimony were taken as to the value of the vessel, and as to the expense of raising and what it would have cost to repair her. As to this question of amount, also, we do not deem it necessary to occupy the time or patience of the Court.

The respondents also filed a libel against the owners of the vessel, claiming damages by reason of improper delay, as they alleged, on the part of the owners of the vessel in removing her from the place where she was sunk. Large quantities of evidence were taken on this subject, which, also, need not be considered here, the court below having held that



the owners of the schooner were not liable for any damages. If, in case of a reversal, it should be held that the owners of the vessel were liable for damages, that question would have to be examined and passed upon independently.

As we have said, we propose now to bring together the statements of fact which are necessary for the considering of the questions which we propose to discuss in the case. We have numbered the various statements, placing under each of them the evidence by which it is sustained. As to those statements about which there is no dispute in the evidence, we have not felt it necessary to set forth all the evidence in full; but as to any of the statements in reference to which there are discrepancies in the evidence, we have endeavored to set forth all the evidence bearing upon each of them.

The facts of the case which it will be important to consider are as follows :

(1.) The appellants leased a wharf in Georgetown near 32d street, (Smith, fols. 513, 515), where they had carried on the business of crushing stone and shipping it for three years prior to this occurrence in August, 1893. The wharf was used only in connection with their own business, no wharfage being charged (fol. 519).

(2.) In August, 1893, an agreement was made through Mr. Lee, who was a broker, by the captain of the schooner "Ellen Tobin," to take a load of crushed stone for the appellants from their wharf to Fortress Monroe, at a freight of fifty cents a ton.

(Hankins, fols. 68, 69).

(3.) The "Ellen Tobin" was a three-masted schooner of 413 tons register. Her keel was straight and 125 feet long. She was 32 feet wide.

*Libel, fol. 3:* She is registered at 413.61 tons.

*Endicott, fol. 363:* "She had three masts."

*Hankins, fol. 118:* "The schooner was 32 feet wide. She was about 125 feet keel. \* \* \* The keel was supposed to be straight the whole length of her."

(4.) She arrived in front of the appellant's wharf on Wednesday, August 2, 1893.

Libel, fols. 3 and 4.  
Hankins, fol. 71.

(5.) On Thursday, August 3, they began loading her. The master took in at the after hatch on that day about 100 tons of stone.

*Hankins, fol. 71:* They went to work as soon as they got ready Thursday morning after we got in place dumping stone in the aft hatch. We arrived there Wednesday and this was Thursday. We worked all day in that hatch Thursday.

*Speaker, fol. 659:* "I don't believe I got in over 100 tons on Thursday, if I got in as much."

(6.) On Friday, August 4, they continued taking in stone at the after hatch till after 2 P. M., when the schooner was moved aft so as to receive stone into the forward hatch from an iron chute, having taken in at the after hatch 300 tons of stone in all.

*Hankins, fol. 72:* "About 3 o'clock on that afternoon—in the morning, Friday, I told the mate when she was low down to 13 feet—Friday morning I told him when she was loaded down to 13 feet aft to haul her back so they could work in the forward hatch. \* \* \* I came down about 3 o'clock on board the vessel and the mate had just hauled her—just got her fast."

*Twiford, fol. 235:* "We resumed work Friday morning at 7 o'clock. We kept working till noon; then we knocked off till 1 o'clock, and then went to work till a few minutes after 2 and hauled the vessel astern, to enable us to work in the forward hatch."

*Speaker, fol. 658:* "I think I got in about 200 tons on Friday."

*Fol. 677:* "You said that on Thursday you put on board about 100 tons and on Friday about 200 tons—that made 300 tons; where was that put?"

A. "That was put in the after hatch."

(7.) After the schooner was moved aft, stone was put in at the forward hatch till about 5:15 P. M. on Saturday, when about 100 tons had been taken in at that hatch.

*Hankins, fol. 73:* "We worked on in the forward hatch all day Friday, loading stone, crushed stone, and still Saturday."

*Id., fol. 74:* "He worked until 15 minutes after five and quit."

*Speaker, fol. 678:* "And on Saturday you put on board about 100 tons?"

A. A little more than 100. That was put in the forward hatch."

This makes about 400 tons in all as alleged in the libel (fol. 4).

(8.) The draft of the vessel forward and aft at different times was as follows:

When she came to the dock, 7 ft. forward and 7 ft. 10 aft.

At 2:30 P. M. Friday, about 8 ft. 6 forward and 13 ft. aft.

At noon Saturday, 11 ft. 4 forward.

At 5:30 P. M. Saturday, 12 ft. 10 forward and about 10 ft. aft.

At 7 A. M. Sunday, 12 ft. 10 forward and about 10 ft. aft.

*Hankins, fol. 93.:*

"Q. When you got your vessel into her berth, how much water did she draw? A. She drew 2 inches less than 8 aft and about 7 feet forward. \* \* \* I cannot say how much she drew at any time Thursday.

*Fol. 94:* "I don't know how much she drew Friday morning. \* \* \* At half-past two on Friday she drew 13 feet aft and she was drawing about 8½ forward.

"I did not look Friday evening to see what she was drawing. She was coming up on an even keel.

"I don't know how much she drew Saturday morning."

*Fol. 95:* "At Saturday noon she was drawing about 11 feet 4 inches forward. I don't know exactly how much she was drawing aft.

"Saturday afternoon when we stopped work she was drawing 12 feet 10 inches forward ; aft she was drawing about 10 feet, 10 to 11 feet, 10 feet 10."

*Fol. 96 :* "On Sunday morning she was drawing the same as she did Saturday night. I did not measure. All you had to do was to look at the mark. I looked at the mark. It was the same forward. I didn't look aft Sunday morning."

*Fol. 97 :* "On Saturday afternoon, when we stopped, she had no water in her and she was lying, I should judge, from 20 to 24 inches by the head, low down by the head ; and she was drawing at that time 12 feet and 10 inches of water forward."

*Fol. 75 :* On Sunday morning "she was over 18 inches to two feet down by the head, I should judge. She was drawing 12 feet 10 inches of water forward."

*Twiford, fol. 247 :*

"Q. How much water did the schooner draw when you went home on Saturday afternoon?"  
A. She was drawing 13 feet of water, aft, sir.

"Q. And how much forward? A. I guess she was drawing about  $7\frac{1}{2}$  to 8 feet. I didn't notice forward. I know she was out of the water. She didn't draw as much as when she had nothing in her.

"Q. You didn't notice forward? A. No, sir.

"Q. Aft? A. Yes! I did aft. She was drawing 13 feet.

"Q. 13 feet aft and  $7\frac{1}{2}$  feet forward? A. Yes, sir."

(*Saturday afternoon* in the above question was a mistake. Twiford went home on Friday (fol. 241). This was the draft of water on *Friday afternoon*.)

(9.) High water on Friday, August 4th, was at 12:32 M.

Low water on Saturday, August 5th, was at 7:47 A. M. and 7:55 P. M.

High water Saturday was about 1:07 A. M. and 1:28 P. M.

Low water on Sunday morning, August 6th, was about 7 or 8 A. M.

*Hankins, fol. 106* : The tide was high Saturday night about 12 o'clock.

*Lord, fol. 933* : It takes the tide 7 hours to run out and five to run up.

(See tide tables at fol. 832).

(10.) The rise and fall of the tide at this place is usually 3 or 4 feet, but it varies somewhat.

*Lord, fol. 935* : On the Potomac River the tide ebbs and flows in 24 hours, and some  $3\frac{1}{2}$  to 4 feet then. \* \* \* The winds affect it, but on regular tides at regular weather and winds calm the tide comes tolerably regular about the same height.

*Twiford, fol. 234* : I asked him how much the tide rose and fell, and he said from 3 to  $3\frac{1}{2}$  feet.

(And see Lord, fol. 256).

(11.) When the vessel was moved aft the mate sounded, by order of the Captain, and found a little over 14 feet of water at the stern. It was then about one-third of the ebb, and the mate knew that the tide rose and fell three feet to three and a half.

*Twiford, fol. 235* : On Friday afternoon we went to work till a few minutes after two and hauled the vessel astern.

*Fol. 236*. The Captain asked me to sound the depth of the water if we hauled astern. I did so. I found about  $13\frac{1}{2}$  feet of water on the inshore quarter, and about half way between the davits and the rudder I sounded again and I found about  $14\frac{1}{2}$  feet. Well, between 14 feet and a little over.

*Fol. 244*. I made the second sounding right over the taffrail and found 14 feet.

*Hankins, fol. 72, 73* : The mate told me he had 13 feet of water. \* \* \* I took the lead and sounded for myself.

(12.) The attention of the Master of the schooner was called on Saturday afternoon, when they stopped loading, to the position of the vessel, as

indicating that she was resting on something aft of amidships.

*Libel, fol. 5.* That on Saturday afternoon "said berth at said wharf did not contain a sufficient depth of water to even float said vessel in her then not much more than half-loaded condition, and when she was then not drawing more than 12 feet 10 inches at her deepest point, and that when said quantity of stone had been loaded on her as aforesaid it caused her to touch something, being such obstruction."

*Barkley, fol. 47.* Q Why did they pump forward? (on Saturday afternoon.)

A. Because she was down by the head.

*Hankins, folio 73:* Along about 5 o'clock I saw that the schooner was tipping to the head, or about 5 o'clock, between 4 and 5. I asked Mr. Speaker if she was not on something. I thought she seemed to tip too much. He told me no; that she was on nothing. He says forward of the piling, that fourth piling, where it had been dug out, you wouldn't touch there, if you were full loaded, on the lowest tides; just so you breast her off aft, so she don't come in aft there is nothing to hurt you. He said to me that he was going to knock off at five o'clock, that being Saturday, and she would not tip much more anyway, and Monday morning he would put another lighter inside of us.

*Folio 97-98:* On Saturday afternoon when we stopped, she was lying, I should judge, from 20 to 24 inches by the head, low down by the head, and she was drawing at that time 12 feet 10 inches of water forward, and Mr. Speaker and I was looking from the dock to see how much water she was drawing.

Q. Was she afloat then? A. I don't know whether she was when we knocked off or not.

Q. What is your best knowledge? A. I think she was not afloat; and I asked Mr. Speaker if she didn't touch something, and he said "No," and that was the reason I sounded after six o'clock, and after I sounded it convinced me she was afloat, because I didn't strike any shallower water than what floated her.

Q. Your own opinion was that she touched? A. I thought so before I sounded.

Q. And you sounded carefully all around?  
A. Yes sir.

Q. As carefully as anyone could do it? A.  
Yes sir.

Q. And you found nothing to make you think she touched? A. No sir.

*Folio 104:* Q. What was there that called your attention to the condition of the vessel, that made you think she had touched? A. Because I thought she was tipped more in the head than she should have been.

Q. That is bow down? A. Yes sir; by the way the stone was going in.

*Speaker, folio 601:* I stopped loading on Saturday, about 15 or 20 minutes of five o'clock. The captain came onto the wharf, and I was out there; I believe he was out on the wharf when I went out on the wharf. He was standing at the bow of the vessel, standing forward there under the hoister. The captain says to me, he says, "I believe I am ebbing out a little bit." It was then about low tide.

Q. State right there what you mean by "ebbing out"? A. I don't know what he meant by "ebbing out,"—that we were discharging stone in there, and that he was not going down any more; I suppose that is what he meant by "ebbing out." I told him if that was the case we would stop work. He said that he didn't want to get her down by the head, because he was making a little water, and he didn't want to get away from the pumps. He said that if we continued on he believed she was ebbing out; that if we continued to discharge stone in there he would get her too far by the head and she would make a little water; and he didn't want to get her away from the pump. I told him in that case I would stop the machine, and not put any more in, which I did.

*Folio 608:* On Saturday afternoon did the captain ask you if she was not on something and did you say that she was on nothing? A. No sir, I never made any such answer as that.

*Folio 652:* Q. Did you and the captain on Saturday evening just before or when you quit work, look at the schooner's markings forward, and say that she was two feet down by the head, and was drawing 12 feet 10 inches of water forward? A. No sir.



Q. You didn't? A. No sir.

Q. You are certain of that? A. I am positive, sir. The captain called my attention to it, but not to the depth of the schooner.

Q. Did you not say that the schooner was drawing 12 feet 10 inches of water, forward? A. No sir, I didn't.

Q. You didn't say that? A. No sir, I didn't say that.

Q. Did you not on that Saturday evening just before you quit work, or just after you quit work, look at the schooner with the captain? A. The captain and I were standing right under the hoisters.

Q. Under what hoist, the east hoist? A. No, the west hoist.

Q. What happened there? A. The captain says to me, he says, "I believe that I am ebbing out a little," and he says, "I wouldn't like to put any more in forward; she's near about on a level keel now, and I wouldn't want to get her in down by the head; that the vessel is making some water, and I don't want it to get away from the pumps."

*Folio 669:* Q. Do you not say that you suggested to him that another lighter should go in there? A. He had talked of that, he and I together.

Q. And you had suggested it, you say, as I understand it? A. I might have suggested it; he might have suggested it; we were talking together.

Q. Why should you have suggested it? A. Well, to be on the safe side, to lay over Sunday.

Q. To be on the safe side of what, for fear of what? A. For fear?

Q. Yes? A. Well, he said he was ebbing out, and he thought he was aground.

Q. He said he was tipping by the head? A. No, sir; he said he was ebbing out.

Q. Did you not say that he was tipping by the head? A. No, sir; I didn't say that he was tipping by the head. I didn't see it until the captain called my attention to it; and I ain't seen it yet, that she was ever tipping by the head.

Q. The captain did call your attention to it? A. He called my attention; he said he thought she was ebbing out.

Q. And said that he thought that she was down by the head? A. He said he didn't want to get her down by the head, that was the expression he made to me, that she was ebbing out, and he didn't want to get her down by the head.

*Folio 671*: Q. Now, tell us why the suggestion was made by either you or the captain about putting another vessel in there for Sunday? A. When he said that he was caught, probably the suggestion might have been made then. He said she was ebbing out, that is the way he expressed it. Of course he was caught if he was ebbing out. That is the way he expressed it. He said that he thought he was ebbing out, and he did not want to get by the head.

Q. What did you say to that, did you say that you thought he was on something or not? A. I don't know that I made any reply or not.

Q. Did you tell him that the vessel was all right? A. No, sir: I did not.

Q. Well, if he said you did, he is wrong about that, is he? A. Yes, sir.

Q. Dead wrong? A. He must be wrong about it.

(13) The vessel was not caused to leak by anything that happened on Saturday afternoon or evening, but began to leak about the hour of low tide on Sunday morning.

*Barkley, fol. 47*:

Q. How long was she pumped at 6 o'clock Saturday evening. A. Long enough to get 25 strokes out of her pump. I should judge.

Q. What happened then. A. Nothing happened then. She was all right then.

*Hankins, fol. 74-5*: The men all went home then, and we lay as we were after the men had swept; when Mr. Smith's men had all gone home, our men were sweeping the decks. After they got the decks swept up I told them to try the pump, which they did. They got out, I should judge, I didn't count them, about twenty-five strokes of water. We then got our supper, and there was nothing more done that night. Next morning we got our breakfast about seven o'clock. After we got our breakfast I told the men to try the pumps.

I was sitting right by the mizzen rigging, and they came out and caught the pumps and pumped about five minutes, I should think, and she didn't suck. I asked them if she didn't suck, and they said no, the men that was pumping. I told one of the men to run down on the stone in the fore hatch, and see if there was any water in her. He went down, and said there was some, and I said, how much? He took a rake handle that was in the hold, and went just forward of the foremast and stuck it down by the keelson, and showed me how much water there was on the rake handle, putting his thumb on the mark. There was about two feet, as near as I could tell.

*Folio 86 :*

Q. You said that after twenty-five strokes were given from the pumps it "sucked," what do you mean by that? A. It sucked air. You couldn't get any more water.

Q. What did that indicate? A. That there was no water in the hold of the vessel at that time.

*Folio 97 :*

Q. On Saturday afternoon when you stopped, what was the condition of the schooner? A. Her condition was good.

*Folio 107 :*

Q. During all of Saturday night you knew of nothing being wrong in the position of the vessel, or as to her condition? A. No, sir.

Q. When did you first suspect she was leaking? A. When we tried the pumps.

Q. What hour? A. Between half past 7 and 8. We had breakfast about 7, and we then tried the pumps.

Q. Between seven and eight? A. About half past seven, I should judge.

(14) The position of the vessel on Friday afternoon was a positive demonstration to the Master that she was, at that low tide, resting on something about amidships, which lifted her stern about two feet.

On Thursday they put in about 100 tons, and on Friday about 200 tons. That made 300 tons, that was put in the after hatch. (Speaker, fol. 678).

On Friday at 2:30 P. M., the vessel drew 13 feet aft and about 8 feet forward. (Hankins, fol. 94).

They stopped loading in the after hatch about 3 P. M. Friday, and hauled her aft and began loading in the forward hatch. (Twiford, fol. 235).

At about 5:15 P. M., on Saturday, they had put in the forward hatch a little more than 100 tons. (Speaker, fol. 678).

And then Hankins, her Master, saw that she was lying 20 to 24 inches by the head and that she was drawing 12 feet 10 inches forward and between 10 and 11 feet aft (Hankins, fol. 95, 96, 98).

Stephen W. Smith, libellants' witness (fol. 1000) testifies,

Q. Suppose a vessel, when fully loaded would take a cargo of 600 tons and would draw 14 feet 3 or 14 feet—that is at the deepest point when fully loaded—when such a vessel loaded with 300 tons in the aft hatch and 100 tons in the forward hatch, reasonably trimmed, and she was dipping by the head 18 or 24 inches, what would that indicate? A. *It would indicate she was on something abaft of amidships. A vessel with that quantity of cargo in her aft and that quantity forward, ought to be at least two feet at the stern if she was afloat.*

Q. Why would that be indicated? A. The weight of her cargo, 300 tons in her after hold and 100 tons in her forward hold certainly does not balance. She is bound to be by the stern, if she is afloat.

This evidence is not contradicted or criticised.

(15.) It was understood by the foreman of the wharfinger that the master of the schooner would move his vessel out from the dock at high tide on Saturday night; and, on Saturday afternoon, he made the arrangements necessary to enable the Master to do so.

But the Master did not move her.

*Barton, 616.*

*Taylor, 626.*

*Speaker, 601:*

The pole came down Saturday.

*Folio 602:* After the machine stopped, it being

Saturday night, the men all took out for their money, and so after the men got away he and I were standing on the wharf alone. And he says to me, "What am I going to do about this iron chute up here." He says, "I want to haul on high water, and you have not told me what scow I shall use." I pointed to him, and I says, "Here's the scow lying right ahead. Take the scow lying right ahead of you, that's the most convenient." He said he wanted to haul on high water, and I told him to use that scow. So I went out then, and to have it all straight, I called some of the men back to take the iron chute down, and they laid it on the schooner.

*Folio 603:* He said he was going to haul on high water, and that's why he asked me to take the iron chute down and detach it there over Friday, because it ran up through his rigging, and interfered with his hauling. He asked me to take it down, so that he could haul on high water. He didn't say what high water. But he said he wanted to haul on high water.

*Folio 609:* Q. Did you tell the captain on Saturday afternoon, between 5 and half past 5 o'clock, that you would be down there on Monday morning, to put in another lighter, before you commenced work? A. No, sir.

Q. Did you tell him anything of that kind? A. No, sir. I told him on Saturday when we talked, and I left with the understanding when I took the chute down for him and designated the scow which he could use, I left with the understanding that he was going to haul on high water, and on the first high water. He didn't say the first high water. But he said that he wanted to shift on high water; that's the way he expressed it.

Q. He said that he wanted to shift on high water? A. That is the way he expressed it, exactly. I took the chute down for him, and told him which scow to use.

Q. Did you tell him in any way, or give him in any way to understand that you were going to shift it on Monday morning? A. No, sir; I didn't.

Q. Did you give him to understand that you considered this vessel safe there, and it was not necessary to move her until Monday morning? A. No, sir; I didn't. If I had done that I

would not have made preparations to get the pole and scow, and preparations to put another scow in there.

Q. What, if anything, did you do to aid him in shifting on the next high tide? A. I merely took the chute down for him, and showed him the scow to be used. I didn't make any preparations, any other preparations, about shifting.

Q. Did he at any time say that he expected you to do the moving? A. No, sir.

Q. Or give you to understand in any way that he thought you would do the moving? A. No, sir.

Q. State if he seemed to mean to move, or expressed the intention of moving? A. He expressed the intention of moving, and that's the reason why he asked me to take the chute down for him.

*Folio 659:* I had no business directing the captain when to move the vessel. He did the directing himself; that was his business. When he wanted the vessel moved that was his business to do. I never directed him to move the vessel at all. That was apart from my work altogether. I was there to assist him in moving, but I never gave him any directions when to move his vessel.

*Folio 660:* I had nothing at all to do with him moving his vessel. He could move his vessel as long as I could discharge into the hatch. I had no right to dictate to him where he should move his vessel.

Q. State what directions were given the only time you say the vessel was moved; who gave the directions? A. He gave the directions where to move.

Q. Did he not first ask you if he could move it? A. Why should he ask me? I had nothing to do with his moving the vessel. I don't have any recollection of him asking me (see fol. 664.)

The evidence of Capt. Hankins on this point, is somewhat different, but on the whole it sustains the evidence of Speaker.

*Hankins, folio 73.*—On Saturday afternoon Speaker told me that he was going to knock off at five o'clock, that being Saturday and she wouldn't tip much more anyway, and Monday morning he would put another lighter inside of us. I asked him how he was going to get the

stone on board aft after he put the lighter inside, and I said you had better knock off work now, if you are going to put a lighter in Monday morning, and not put any more stone in." He said, "We are only going to work a few minutes now, it is nearly five o'clock. Monday morning we will put the lighter in. \* \* \*" After he had quit he told me he would be down there Monday morning to put another lighter before he commenced work again. After the men had gone up to get their pay, up to the office, it came to my mind if we waited until Monday morning I would lose something in the hauling, and if he would take the chute out that was in our hatch, I would put the lighter in between that time and Monday morning, and not lose any time. There was an iron chute that they put in the end of the wooden chute that extends from the building down to the hold of the vessel, and it was impossible for me to haul with that in there, and I wanted him to take that out. He said he would get some of the men to take that out. After they had got their pay there were two or three men came down there and took the chute off and lowered it on our deck.

*Folio 105 :* Q. The chute was taken out in order that the scow could be put in? A. He didn't take it out, but I asked him. He went away and left it there in the hold.

Q. You asked him to take it out, and asked him about the scow? A. I asked him where the scow was; if he would leave one there I would put it in before that time and Monday morning, so he would lose no time. He showed me a scow, a lighter, above Mr. Lee's, and told me I could take it.

Q. Did you take it? A. No sir.

Q. Did you say anything to him? And did he say anything to you as to when you were to shove her out? A. No sir; only I said I would have her in Monday morning.

Q. When did you say that you would put the scow in, or shove the schooner off? A. I told him between that time and Monday morning.

*Folio 106 :* Q. Did you at any time during the night or before Sunday morning, put the scow in, or shove the vessel off? A. No sir. Between Saturday night, do I understand you?



Q. Or Sunday morning? A. No sir; I didn't think it was necessary.

Q. Or any time during Saturday night? A. No sir.

Q. Why not? A. Because I didn't think it was necessary. Mr. Speaker told me there was no danger laying where we were, and I had also sounded around the vessel and found water enough.

Q. When did you intend to move the schooner out? A. I thought probably I would do it Sunday. It would be owing to the weather, winds and weather. I might have done it Sunday. I don't like to work Sunday, but if it had been fine weather, with not much wind, so she could haul easy and shove her off I would have done it Sunday. If it had been blowing I would have waited until Monday morning.

Q. How long would it have taken you to have shoved her off and put in the scow? A. Probably it would have taken me an hour to slack the lines and shove the vessel off and put in the scow.

And the other witnesses sustain Speaker.

*Smith Folio 552*: On Saturday morning Mr. Speaker made some reference to the advisability of getting another pole in case the captains were willing to put in two scows, so that the vessel could be shored off all the way or part of the way, as it might seem best. I sent a note to the quarry foreman to send down another pole on the scow that came down at noon, and I told Mr. Speaker that it might be well if the captain of the *Tobin* thought so, to have a second light scow lay in over Sunday, and to say to the captain of the *Tobin* and do whatever he wished him to do in the matter. \* \* \* I know that the pole came down on Saturday; the pole I ordered.

*Folio 554*: I told the captain Mr. Speaker would give him anything he wanted and do anything he wanted. If he wanted a pole to shove him off more than one scow, we would give him that, or give him two scows.

*Barton, Folio 615*: We just had knocked off from work, and we started to go after our money, and he called us back to take the chute down before we got our money. \* \* \* We went back and took down the chute, and laid

it on the vessel there. No. 7 scow was between the vessel and the wharf, and another light scow was lying right above the vessel.\* \* \* She was lying there and they were going to shove her between the other scow and the vessel, and the captain said "shove her in"—

Q. When the chute was laid on the vessel where was the captain? A. They were on the vessel.

Q. Did you hear any conversation between them, and if so, state what it was? A. Just only I heard Mr. Speaker ask the captain did he think it was safe, and the captain told him yes, he thought that there was water enough there. He was measuring the water there all the time that the vessel was loading; and the captain told him yes. He said on high tide he would shove the other scow in.

Q. The captain said that to Mr. Speaker? A. Yes.

Q. What scow did he refer to? Did he point to it, or in any way indicate which he meant, which scow it was he was going to shove in?

A. I don't know whether it was No. 3 scow now, or not. It was a light scow, I know.

Q. A light scow that was there? A. Yes.

Q. Did you see anything of a pole at that time? A. Yes, sir; there was a pole brought down the same day, on Saturday, and there was one on the vessel that she was propped out with.

Q. What time was this on Saturday that you took down the chute and heard this conversation? A. It was about 5 o'clock in the evening, sir.

*Taylor, Folio 626 :*

Q. Did you hear any conversation between the captain and Mr. Speaker at that time (when the chute was taken off), about putting in a scow? A. Yes, sir.

Q. If so, what was said? A. He told Mr. Speaker that he would put that scow in on high tide.

Q. What scow was it? A. I don't know the number of the scow.

Q. Where was she? A. She was lying up at the bow of the vessel.

Q. In plain sight? A. Yes, sir.

Q. What did Mr. Speaker say? A. He told him all right, sir.

(16) The point of the rock was about 40 feet from the wharf and it came in contact with the vessel a little aft of amidships.

*Hawkins, fol. 89.*

*Fol. 117:*

Q. I suppose you know how far the rock was from the outer edge of the wharf? A. Yes, about 40 feet.

Q. Forty feet from the outer edge of the wharf to the inner edge of the rock? A. I don't know it was the inner edge, it was the highest point. I couldn't tell exactly.

*Purson, fol. 144:* "This drawing represents the rock as near as I could get it."

*See diagram at p. 90.*

*Fol. 146:*

Q. Can you tell us what part of the rock was farthest from the wharf—was it the highest or lowest? A. Highest part.

Q. The highest part was the farthest from the wharf? A. The highest part; there is not much difference, but the highest part is furthest from the wharf.

*Hankins, fol. 116:* "I sounded there with a diver at the bottom to hold the stick on the rock, at 11.15 A. M., November 29th, and found 12 feet and 6 $\frac{3}{4}$  inches of water on the rock, at that time. At one o'clock P. M. it was high water, and the tide had raised 11 inches from the time I measured until high water, which made 13 feet and 5 $\frac{3}{4}$  inches on top of the rock at high water."

*Harp, fol. 168:* I marked on Exhibit No. 5, 12 feet and between 8 and 9 inches from the top of the rock to the surface of the water.

(17) The schooner was 32 feet wide. She lay outside of a scow or lighter which was about 20 feet wide, there being piles along the face of the wharf, so that the schooner lay about 24 to 28 feet from the wharf, aft. If another scow 20 feet wide had been put in between her and the dock, her side

would have been 44 to 48 feet out from the dock, or 4 to 8 feet outside of the point of rock.

*Hankins, fol. 98* : " There was a lighter lying inside of us all the time she was there.

*See Smith (fol. 773) and Measurement of Scows at fol. 849.*

*Hankins, fol. 73* : About 3 or 4 o'clock Saturday afternoon \* \* \* I breasted her off about well over two feet, I suppose, further than what she was.

*Hankins, fol. 117* :

Q. How wide was the scow that was between you and the wharf? A. Eighteen feet, I think, Mr. Speaker told me she was; I didn't measure the scow.

Q. How far was the schooner from the outer edge of the scow when she sunk? A. She was about 2 feet forward and 6 feet aft.

Q. Just the same position she was on Saturday? A. Yes, sir.

Q. That would be about 20 feet forward? A. Yes, sir.

Q. And how many feet aft, 24 feet aft? A. Yes, sir; 24 feet from the wharf aft, and say 18 feet from the wharf forward.

*Brewer, fol. 175* :

Q. State if you can by looking at that map how far the schooner there sunk when she was on the rock or other obstruction; how far was her starboard or right side from the fourth pile marked here on the wharf? A. I can approximate; I guess about 28 feet.

*Fol. 181* :

Q. By actual measurement what was the distance from the vessel's edge to the edge of the wharf? A. That is about 27½ feet.

*See Barkley, fol. 492.*

(18). There is a conflict of evidence as to whether the appellants or their agent made any representations to the master of the vessel as to the depth of the water. But there is no dispute that the master of the vessel was instructed by the appellants to ascertain the depth of water in the berth by

sounding. And he did sound and also caused soundings to be made for that purpose.

*Barkley, fol. 51:* On Saturday afternoon I seen the captain sound myself.

*Hankins, fol. 72:* Friday, I think somewhere along towards eleven o'clock, I was in Mr. Lee's, and Mr. Smith came in. Mr. Lee gave me an introduction to Mr. Smith, and told me he was the gentleman I was loading for. That was the first time I had seen him. I asked Mr. Smith how long it would take to load her. He told me he thought he should finish me on Monday. He could load about 150 tons a day. I asked him how much water he had there. He said that he had had it dug out this spring, in April, and that they were to make 14 to 15 feet, and that there was 14 feet, sure, at low water. Mr. Smith told me he would like me to make some soundings for myself. He said there might be something dropped over from the lighter he didn't know of, but would like me to sound. \* \* \* I told the mate what Mr. Smith told me about the water, and about sounding, and if hauled when I was not there to be sure and sound and find the depth of the water. After dinner I went up to Mr. Lee's store again, and came down about 3 o'clock, on board the vessel, and the mate had just hauled her, just got her fast. I asked him if he sounded, and he told me he had.

*Folio 73:* He (the mate) told me they had 13 feet of water. I took the lead line and marked it off, and went on board. I marked it off in feet, and tied rope yarn around the lead line, and I measured with my rule one foot apart, and then took the lead and sounded for myself. I commenced aft and sounded up to the mizzen rigging; the least I found was 13 feet, and 2 or 3 inches, and after I got by the mizzen, that piling where Mr. Speaker told me it was dug out to, it deepened off to 16 or 17 feet.

*Folio 74:* On Saturday, after they had all went home, I took the lead and sounded all around the vessel, and then it was about low water. I didn't find less than 12 feet anywhere on the inside, and I didn't find less than 14

feet and a half on the offshore side ; and right over our stern, about four feet inside of our keel, there was 13½ feet of water.

*Folio 85 :* Q. Captain, when you mention the fact that Mr. Charles E. Smith, Jr., told you to sound, what did he say? Please state his exact words, as well as you can. A. When I asked him how much water there was he says we had it dug out to 14 or 15 feet, at low water, "but I would like you to make some soundings for yourself." He said, "There is not less than fourteen feet."

Q. Well, you sounded accordingly? A. I did.

Q. Where did you sound? A. All around the vessel.

Q. You sounded all around the vessel? A. Yes, sir. From one end of it to the other, on both sides.

Q. Why did you sound around the vessel? A. I wouldn't say all around, but from one fore rigging around to the other fore rigging.

Q. Why did you sound all around? A. To see what kind of bottom there was.

Q. Had Mr. Smith spoken of the condition of the water in the middle of the berth? A. Mr. Smith told me it was dug out to that piling, that is in April.

Q. That was your reason for sounding around and not under the vessel? A. I couldn't sound under the vessel. That was impossible. I could sound all around, which I did, and found nothing to hurt the vessel, nowhere I could sound. \* \* \*

Q. You didn't sound aft of the rigging of the after mast? A. I sounded abreast of it.

Q. Did you sound inside or outside the vessel? A. Both.

Q. You sounded on both sides? A. Yes, sir.

Q. You sounded inside and outside after the mizzen rigging? A. Yes, sir, and forward of it too.

Q. On both sides, or one? A. Both.

*Folio 97 :* The last time I measured before she sunk was about Saturday night, after we quit work, about 6 o'clock; then it was about dead low water. I sounded on both sides, and I didn't find less than 12 feet of water aft, abreast of this piling I speak of. And, after I got to this

piling I didn't find less than 15 feet of water, and on the other side I didn't find less than fourteen feet of water, and after I got opposite the piling it went to 17 or 18 feet.

*Folio 101:*

Q. And Mr. Smith told you he would like you to sound for yourself? A. He said he would like me to make some soundings for myself.

Q. That was what time of the day? A. I think it was a little before noon. I should judge about 11 o'clock.

Q. What did you say in reply to that advice of his? A. I told him I would.

Q. And did you do it? A. I did.

Q. Immediately? A. No, sir, not immediately.

Q. When? A. I did that afternoon.

Q. What time? A. I sounded the first time along about two or three that afternoon. I went and got my lead line, and marked it off in feet, and commenced right aft of the quarter on the starboard side of her, and sounded about every four feet, as near as I can state, with the lead. I walked right along the deck of the vessel and dropped the line just so it was against her side, up to the forerigging on the starboard side. Then I took the lead line in and went on the port side and did the same.

Q. So the only part you didn't sound around the vessel was between the forerigging and the stem? A. That was it. Yes, sir, I didn't sound there.

Q. What distance is that? A. I should say about 12 or 15 feet.

*Folio 122:* After I had an introduction to Mr. Smith, and he told me how much water there was—that there was 14 feet sure, at low water—he told me that he would like me to make some soundings around for myself, and he said he would have his men help my men shove off with a pole that he had on the lighter, whenever we wanted to shove off, and he wanted me to sound on the inside, as some stone might have gotten off the lighter. And if we shoved her bilge off, or side he called it, so we didn't hit the stones, there was nothing to hurt us. And when he came on the dock that afternoon he told me the same thing.

See fol. 917.



*Fol. 123 :*

Q. Did you make any soundings when you were lying above the wharf, before you took your position? A. He told me there was plenty of water there.

Q. I wish you would answer my question, I didn't ask you that; I asked you as a matter of fact, if you made any soundings? A. No, sir.

Q. You could have made soundings, could you not? A. When I first made fast to the dock, when I first came up, I couldn't.

Q. Why not? A. Because there were three scows abreast there; that is the reason I couldn't get to the dock with the vessel.

Q. Could you, just before you went to the dock? A. Yes, sir.

Q. How long would it take to move the vessel away from the wharf to make the soundings? A. I couldn't move the vessel away from the wharf to make the soundings.

Q. Why not? A. I had nothing to breast her with.

Q. Was there no pole there? A. No, sir; there was a pole there 25 or 30 feet long, but that was not long enough.

Q. Did you ask for a longer pole? A. No, sir.

*Lee, folio 129 :* On August 3d the captain was in my office, and Mr. Smith came in there, and I introduced him to Mr. Smith. I said, "Captain, this is your shipper, and you will have to make your complaints to him." The captain said, "How about the water there." Well, I presume I ought to have allowed Mr. Smith to answer the question, but I answered it for him, and I said the dock had been dredged out, supposed to be 14 feet, though he might touch at low water. Mr. Smith said to him, "I want you to make some soundings for yourself, and our Superintendent will help you to place the vessel."

*Folio 137 :*

Q. When you introduced Capt. Hankins to Mr. Smith, which was some little time then after the contract had been actually made, through you? A. Yes, sir.

Q. And the vessel was then being loaded, wasn't it? A. It was between 9 and 10 o'clock in the morning that I introduced him.

Q. Of what day? A. The third, the day they commenced loading. \* \* \* The vessel came down on the second; I put it down on the memorandum.

Q. Then you think it was the third that you had this conversation with Mr. Smith? A. I am satisfied it was the next morning.

Q. You do not know whether it was Friday, or not? A. I don't know the day of the week.

Q. In that conversation did you hear Mr. Smith say anything about the depth of water? A. No.

Q. You did hear the conversation about the soundings? A. He asked the captain to sound for himself; yes, sir.

*Folio 139:* The captain asked as to the water, and I replied that the dock had recently been dredged out, supposed to—14 feet, at low water; “though your vessel might ground at low tide.”

*Twiford, folio 236:* I proposed to Mr. Speaker to go aft with me and sound and see how much water there was, because the captain asked me to sound the depth of the water if we hauled astern. I did so. I found about  $13\frac{1}{2}$  feet of water on the inshore quarter. And about half way between the davits and the rudder I sounded again, and I found about  $14\frac{1}{2}$  feet, well, between 14 and a little over 14 feet,  $14\frac{1}{2}$ . Then I also took the lead abreast of her aft hatch, and sounded there, and there was about 15 feet; that was on the inshore side.

*Folio 238:*

Q. You say you sounded first and found  $13\frac{1}{2}$  feet on the inshore, did you say that—the inshore quarter? A. Yes, sir.

Q. About how far was it from where you dropped the lead to the long chute? A. It was probably eighty feet.

Q. After you sounded and found 15 feet on the inshore side did Mr. Speaker say anything about the condition of the water? A. Yes, sir.

Q. What did he say? A. He said the water was deeper *further ahead*. See *folio 242*.

*Folio 243:*

Q. Where did you make the first soundings? A. Aft.

Q. Whereabouts? A. I suppose it was about eighty feet from the chute.

Q. How far from the stern? A. I will say from 6 to 8 feet.

Q. Where you made the first sounding was there anything between the vessel and the wharf? A. I don't think there was, to the best of my judgment.

Q. What was the depth you found there? A. 13½ feet.

Q. Where did you make the second sounding? A. Right over the taffrail.

Q. How far from the stern? A. It was precisely at the stern; the taffrail is what we call the stern of the vessel; the yawl boat at the davits. I dropped the lead between the yawl boat and the taffrail.

Q. The second sounding was at the stern? A. Yes, sir.

Q. What depth did you find there? A. 14 feet.

Q. And how far was the stern from the wharf? A. The stern was, I guess, about 22 feet from the wharf; right at that place.

*Folio 245 :*

Q. Did you ever sound on the outside? A. No, sir.

Q. Never? A. No, sir.

Q. Did you ever see the Captain sound on the outside? A. No, sir.

Q. Since you went there? A. No, sir.

Q. And the soundings you made were the only soundings you know of being made when you got there? A. Yes, sir.

*Re-Direct.*

Q. You said you did not sound after those three soundings? A. No, sir.

Q. Why didn't you sound after those three soundings? A. Mr. Speaker said "you needn't sound any more, there is plenty of water forward, where you are to haul your vessel."

*Smith, folio 516 :* I think the captain asked what the depth of water was in front of the wharf. Mr. Lee answered the question. I don't know whether the captain asked me, or asked Mr. Lee, but Mr. Lee answered him, by saying that it had been dredged out in the spring to the supposed depth of 14 feet. The captain had some conversation with Mr. Lee, I think, as to about what water he drew, and he also said it wouldn't hurt him to lay on the bottom if the bottom

was in decent shape. I told him I didn't know just what the bottom was, but I would advise him to make his soundings there, and find out from time to time just how his vessel was laying; that I would see that he had any assistance he wished in moving the vessel forward or aft, or shoving her out; that we would do just what he wanted done; and that after he made his soundings he could tell me what he wanted done.

*Folio 567 :*

Q. Did you tell Captain Hankins at any time to sound inside his vessel and near about the third or fourth piling? A. No, I never said anything about any piling.

Q. Did you tell him to sound inside of his vessel, because some stone might have dropped off the lighters? A. I may have told him that there might have been some small stone in there.

Q. When did you tell him that? A. If I told him at all it was when we were in Lee's store. I told him to sound; I don't recollect anything particularly about it. I might have told him that some small stone would have been likely to have dropped in there, as we are handling stone on the wharf all the the time.

*See also Speaker, folios 594, 596, 604, 607, 608, 613, 673, 679, and Hankins, folio 920.*

(18) The wharfingers did not know of the existence of any such rock. Answer, folio 26.

*Smith, fol. 534.*

### **Assignment of Errors.**

1. The Court erred in not reversing the decree of the Court below.

2. The Court erred in not dismissing the libel with costs.

3. The Court erred in denying relief to the appellants upon their cross libel.

4. The Court erred in decreeing that the libellants were entitled to recover against the respondents, by reason of the facts shown in the record.

5. The Court erred in not holding that the proximate cause of the injury to the libellant's vessel was the Master's allowing her to remain in the berth after he knew of the depth of water, and knew that she had touched the bottom at low tide.

6. The Court erred in its decree of August 27, 1895, in decreeing "that respondents, Charles G. Smith and Charles G. Smith, Jr., are solely liable for such injury and the damages thereby resulting to the libellants," as therein referred to (p. 584).

7. The Court erred in its decree in deciding that "eight thousand dollars was the market value of said schooner at the time of her injury and wrecking August 6, 1893" (p. 687).

8. The Court erred in decreeing that the libellants were entitled to interest on the said amount from the said 6th day of August, 1893. (p. 687).

9. The Court erred in allowing to the libellants the cost of raising the cargo from said vessel, with interest from November 5, 1893 (p. 687).

10. The Special Commissioner erred in his finding and report in reporting "the value of the 'Ellen Tobin' immediately prior to the injury at the round sum of \$6,000" (p. 589), and which finding respondents

excepted to (p. 659), and which exception the Court overruled (p. 686).

11. The Court erred in dismissing the cross-libel filed by the appellants, with costs (p. 687).

12. The Court erred in making the decree of April 6, 1897 (p. 699).

### **First Point.**

The appellants' wharf is on the bank of a public navigable river.

The bottom of the river is owned by and is under the jurisdiction and control of the United States.

The bottom of the river in front of the appellants' wharf is of rock (fol. 1039), and of such a character that it would be impossible to make or keep it absolutely and perfectly even and level (fols. 433, 441). This is conclusively shown by the Government Survey of the Georgetown channel in front of the wharf, made in 1884 (p. 584) and Wanner's chart at p. 468.

The libellants had no charter party or written agreement by which a certain depth or a sufficient depth of water was guaranteed.

The appellants' wharf was used exclusively for loading and unloading stone.

No charge was made for wharfage.

The libellants on Wednesday afternoon, August 2, put their vessel in front of the appellants' wharf, outside a scow 20 feet wide that was at the wharf.

When she took her position outside the scow, the vessel drew 7 feet 10 inches aft, and about 7 feet forward.

It was the intention of the captain to load with 600 tons of crushed stone, and when so loaded the vessel would draw  $14\frac{1}{2}$  feet of water.

The stone was to be put on board by the appel-

lants, but the distribution of the load on the vessel, the quantity to be taken on board, and the movements of the vessel were under the exclusive control of the master.

Under these circumstances the duty of the appellants was performed, if they exercised reasonable and ordinary care to have and keep the place where the vessel lay in reasonably good and fit condition, and to notify the master of any hidden obstruction which would endanger his vessel, of which they knew, or could have known by the exercise of reasonable care.

On the other hand it was the duty of the master, before fully loading the vessel, to ascertain whether the draft of water in the berth was sufficient for his vessel when loaded and drawing  $14\frac{1}{2}$  feet of water.

It was his duty, after she was in her berth, to exercise reasonable care and skill and due diligence in the management of his vessel, to avoid known dangers, and to take reasonable and ordinary precautions for her safety.

If the loss of the libellants' vessel was directly and solely caused by the negligence of the appellants to perform their duty, the appellants are responsible for the loss.

If the loss was directly and solely caused by the negligence of the master and his failure to perform his duty, then the appellants are not liable.

If there was negligence which contributed to the injury, both on the part of the appellants and the master, then the loss resulting therefrom must be shared equally by the libellants and the appellants.



## Second Point.

This case differs from most of the cases cited by the Court below, in that the point of rock appears to have been a part of the natural bed of the river.

It was not a part of the construction of the dock, as were the cases of *Leonard v. Decker*, 22 F. R., 741, and *Smith v. Havemeyer*, 36 F. R. 928.

Nor was it a case of piles driven into the bottom of the river and negligently left there, as were the cases of *The Phil. etc., R. R. Co. v. The Phil. etc., Towboat Co.*, 23 Hun, 209, and *Penn. R. R. Co. v. Atha*, 22 Fed. Rep., 920.

Nor was it a case of the berth being allowed by the owners of the wharf to become filled by extraneous substances, as was the case of *Sawyer v. Oakman*, 1 Lowell, 134, and *The Stroma*, 50 Fed. Rep., 557.

Nor was it a case of a guaranty of a certain depth of water as were the cases of *The Annie R. Lewis*, 50 Fed. Rep., 556, and *McCalden v. Parks*, 66 Hun., 323.

It was more like the cases of *Christian v. Van Tassel*, 12 F. R., 884; *O'Rourke v. Peck*, 40 F. R., p. 907 and *Barber v. Abendroth*, 102 N. Y., 406, as to the cause of the injury, although those were cases of loaded vessels coming to a dock to discharge instead of unloaded vessels coming to load.

## Third Point.

It is surely the fact that the presence of any rock in the river, which would prove dangerous to the vessel while loading at the appellants' wharf, was not known to the master of the vessel when he went to the berth.

It is equally clear that the presence of such a rock was also unknown to the owners of the wharf.

For it is certain that, if the presence of such a rock had been known to the owners of the wharf, they would not have incurred the risk of the vessel's being injured by it, but would have warned the Master of its presence.

The Court below says (fol. 697) that "It would be difficult to conclude on the evidence in this record, that the appellants did not have knowledge of the existence of the rock and of its dangerous nature."

With great respect for the Court below, we must say that it seems to us *impossible to conclude that they did* have such knowledge.

The evidence is positive that they had no such knowledge.

*Smith*, fol. 534.

And it is utterly incredible that, if they had such knowledge, they should have allowed the Master to place his vessel where she was liable to receive injury.

It is true, as the Court below says, that it appears that in December, 1892, eight months previous, a vessel, the *Francis H. Bird*, had got on a rock in front of this wharf, and that the owners of the wharf knew it at the time. But it is equally true that the Master of the *Tobin* was informed of that fact (Speaker, 613-656).

And it is equally true that in the following spring the appellants had had the berth dredged out, had enquired of the dredger as to the depth of water obtained, had been informed by him that there was a depth of water in the berth of 14 or 15 feet (fol. 825), and had seen that soundings were taken which apparently showed it to be so.

Moreover several vessels had loaded at that wharf, some of them larger than the *Ellen Tobin*, and had received no injury.

(*Smith*, fol. 516 and 837 to 842).

Among them was the *Mattie B. Russell* with 550 tons of stone in December, 1892, the *Henry D. May*

with 490 tons in November, 1892, the *John R. Fee* with 520 tons in July, 1892, the *Sunlight* with 700 tons in October, 1892, and after the dredging the *A. Denike* had loaded 650 tons there in March, 1893, without injury.

None of these vessels had happened to get on this point of rock.

(See *The Angelina Corning*, 1 Ben., 139.

See also the pictures of the rock made by Hankins p. 570, and Pierson p. 90).

And, in the face of the fact that all these vessels had loaded in that berth without injury, and that the berth had been dredged as above stated, the wharfinger was certainly not negligent in understanding that there was no obstruction in the berth which would endanger this schooner.

And moreover, whatever knowledge the appellants had as to the existence of such a rock, viz., that one vessel had touched the bottom, was communicated to the Master of the schooner. Speaker swears that he told the Master about it on Thursday or Friday (fol. 613) and he is not contradicted.

#### **Fourth Point.**

The case is not one in which any representation has been made by the owner of the wharf as to the depth of water, or relied upon by the Master of the vessel.

The libel alleges that it was such a case. It avers that the Master of the vessel "had first made full and all proper inquiry of the foreman of the wharf as to what depth of water the berth in front of the wharf contained and had been informed by said foreman *that it contained 14½ or 15 feet of water at low tide* (fol. 4). But this is denied (fol. 23), and the evidence does not warrant the finding that the allegation is correct.

Hankins, the Master, who had sworn to the above statement in the libel was examined as a witness on this point. He testified to three conversations, one with Mr. Lee, his own broker (fol. 68), on Tuesday, August 1, one with Mr. Speaker on Thursday, August 3, after the vessel was in her berth, and one with Mr. Smith, the owner of the wharf, on Friday morning in Mr. Lee's office. (See No. 18 *ante*.)

(1) As to the first conversation Hankins says he asked Lee how much water there was and told him the vessel would draw  $14\frac{1}{2}$  feet loaded, and that Lee told him he could "load there at 14 feet with low water." ((fol. 69-70).

But Mr. Lee says I told him they "had recently had the dock dredged out to a *supposed* depth of 14 feet, *though your vessel might* ground at low water. (fol. 128).

And Lee is libellants' witness.

(2.) As to the second conversation Hankins says that after the vessel was in position he asked Speaker how much water there was and Speaker "said it had been dredged out to between 14 and 15 feet this Spring." (fol. 71).

Speaker says, "I never gave the Captain any statement about the depth of water there (fol. 594), and that the Captain did not speak about the depth of water till Friday. (Fol. 638).

"The only conversation the Captain and I had with regard to the water was that he asked me about the water and I told him we never had any trouble except with one vessel; that we had one catch on us there but that we had extremely low water and a northwest wind. I told him that we had had it dredged out and the man that dredged it reported 14 or 15 feet of water. He said 'I don't draw that much water when I am loaded.' \* \* \* That is the only conversation I ever had with the Captain." (Fol. 613).

(3). As to the third conversation Hankins says "I asked Mr. Smith how much water he had there. He said that he had it dredged out this spring in April and that they were to make 14 or 15 feet and there was 14 feet sure at low water" (fol. 72). But Lee says that when Hankins asked about the water he (not Smith) answered that "the dock had been dredged out, *supposed to be* 14 feet, though you might touch at low water" (fol. 129). And Smith says the same with an unimportant variation (fol. 516).

Several considerations are manifest with reference to the above conversations.

First: Whatever the conversation was between the captain and Mr. Lee, on the first of August, it cannot amount to anything as against the owners of the wharf, because Mr. Lee was the captain's broker and not the agent of the owners of the wharf to make representations about it at all (Hankins, fol. 68; Smith, fol. 517-520). And, again, in the conflict between the captain and Mr. Lee as to what was said, Mr. Lee's evidence should be taken, because he is a disinterested witness and called by the libellants. And it should be held that Mr. Lee only told the captain that the dock had been dredged out to a *supposed* depth of 14 feet and that his vessel might ground at low water. This conversation can, therefore, be no basis for a charge that any specific representation had been made by the owner of the wharf as to a depth of water of 14 *and a half* feet.

In the second place, as to the conversation between Hankins and the foreman, it is not pretended that it took place before the vessel went into the berth. And there is a positive conflict between the captain and the foreman as to what the foreman did say at that time. And it cannot be held, therefore, that the libellant has proved that the foreman made the representations which are alleged.

In the third place, as to the evidence of the master as to what was said in the conversation between him and Mr. Smith, in Lee's office on Friday, Mr. Lee

and Mr. Smith are two to one against the captain. And they testify that the captain was told not that there "was 14 feet sure at low water," but that "the water was *supposed to be 14 feet*, though he might touch at low water." In this condition of the evidence, it must be held that the libellants have failed to make out that there was any representation as to a specific depth of water in the berth.

In the fourth place, the master of the vessel did not rely upon what had been told him by either Mr. Lee or the foreman, for he renewed the inquiry of Mr. Smith.

And in the fifth place, it is proved without dispute that in the conversation between the master and Mr. Smith, he was told by Mr. Smith to *sound for himself* and find out the depth of water, and that the foreman would give him all assistance in moving his vessel, if he desired to move her for that purpose. Capt. Hankins concedes that this was said to him, and that he said he would make the soundings; and he testifies over and over again that he did make soundings accordingly, and directed his mate to make soundings, and that the mate made soundings.

The case, therefore, is one in which the owner of the wharf did not make positive representations as to a depth of  $14\frac{1}{2}$  feet of water, as the libellants alleged, but, on the other hand, spoke of a *supposed* depth of only 14 feet, and directed the master to find out the depth of water for himself. And the master agreed so to do, and made soundings accordingly.

It cannot be held, therefore, that there was any reliance by the master of the vessel on any representation whatever.

In this respect the case is exactly like the case of *The Calliope*, 16th Appeal Cases, p. 11. There the master of the vessel received a letter saying, "You can bring your steamer to the wharf Monday morning's tide, as we have two feet more water than at Bathurst Basin. Pilot will tell you what to do."

The Chancellor, in deciding in favor of the owner of the wharf, said: "It is impossible to doubt that under ordinary circumstances that would mean this: 'This is information which I give you for the purpose of forming your own judgment whether you can come there or not; that is to say, this is the height of water which may be expected at such and such a time, but you, the person in charge of the navigation of the vessel, the captain or the pilot, must form your own judgment, and you must not expect me to give you a warranty that that height of water will exist; but you, the captain or the pilot must form your own judgment upon it and must act accordingly.'"

That is exactly this case. Mr. Smith's telling the captain that he did not know what the bottom was and that he must sound for himself (fol. 85) was, as in that case, a notice to the captain that he "must form his own judgment and act accordingly."

The court below says that the case of *The Calliope* "has no application to the present case" (p. 698-9). The court seems to have paid little attention to the case of *The Calliope*. It was not a case of injury to a vessel "while lying at a wharf," as the Court says. *The Calliope* was injured while *coming to the wharf*. It was a question of approach to a wharf. Moreover the court says that it was a case in which there was "no representation or assurance as to the depth of the water." But there was a stronger representation, as above quoted, than in this case.

The two cases are very nearly identical. The master of the *Culliope* undertook to *take* his vessel into the berth when there was not water enough, as he had reason to know. The master of the *Tobin* left his vessel in the berth when he knew there was not water enough, as we shall show.



### Fifth Point.

But it is quite immaterial whether any representation was made to the master, that there was  $14\frac{1}{2}$  or 15 feet of water in the berth at low tide, *because both the master and the mate knew on Friday afternoon that such was not the fact.*

(a) The master told the mate what Mr. Smith had said about sounding and told him if he hauled the vessel when he (the captain) was not there, "to be sure and sound and find the depth of water."

*See Ante., No. 18. Hankins, fol. 72.*

(b) The captain was not there when the mate hauled the vessel. The mate swears that after he had hauled the vessel he sounded and found, between the rudder and the taffrail, 14 feet of water and on the inshore quarter  $13\frac{1}{2}$  feet.

*Ante., No. 18. Twiford, fol. 236.*

This was a little after two o'clock, the mate says. High water was at 12.32 o'clock (*Ante., No. 9*). So that the tide was then one third down and the mate had been told by Speaker the day before that the tide rose and fell about 3 to  $3\frac{1}{2}$  feet. (*Ante., No. 10.*)

(c) The mate therefore knew that the tide had two feet more to fall and that at low tide, where he had found  $13\frac{1}{2}$  feet, there would be but  $11\frac{1}{2}$ , and where he had found 14 or  $14\frac{1}{2}$  feet there would be only 12 or  $12\frac{1}{2}$ .

And the vessel was then drawing 13 feet aft.

*Ante., No. 8. Hankins, fol. 94.*

The mate, therefore, then knew that instead of there being " $14\frac{1}{2}$  feet of water at low tide," there would not be over 12 or  $12\frac{1}{2}$  feet at low tide where he sounded.

(d) When the master came, just after the vessel was hauled aft, he asked the mate if he had sounded; and the mate told him he had and that he had 13

feet of water. Not content with that, the master took the line and sounded himself and says that the least he found was  $13\frac{1}{2}$  feet. So that the master himself knew that instead of there being  $14\frac{1}{2}$  feet at low water there was only  $13\frac{1}{2}$  feet, with about two-thirds of the ebb yet to sink, leaving  $11\frac{1}{2}$  feet at low water.

(e) This knowledge on the part of the master makes any claim that the owners of the wharf represented that there was  $14\frac{1}{2}$  feet of water at low tide immaterial, because if any such representation had been made, it was a mistake; and the master knew on Friday afternoon that it was a mistake, and knew that at low water on that afternoon, with the cargo she had in her, the vessel would touch the bottom.

(f) If it be asked why, having that knowledge, the captain did not at once move his vessel into deeper water, the answer is that he expected his vessel to touch bottom at low water and was willing to take the risk of it. Lee and Smith both told him she might touch at low water, and the captain said it would not hurt him to lie on the bottom if the bottom was in decent shape, and Smith told him he did not know just what the bottom was and the captain had better make soundings from time to time.

*Ante., No. 18. Smith, fol. 516.*

That his vessel might touch bottom at low water was in the captain's mind, and therefore, probably, he did not move her when the soundings which he made warned him that she would do so.

(g) And, moreover, the master learned by his own soundings that the bottom of the berth was not flat, and that his vessel, if she did touch the bottom, would find it uneven.

He sounded on Friday afternoon, just after she was hauled, and found 13 feet and 2 or 3 inches, and then by the mizzen he found 16 or 17 feet (fol.

73). Then he breasted his vessel off and sounded again and found the same difference in the depth of water.

Here was then, as he knew, a difference of three or four feet in the height of the bottom under the vessel.

(h) Without dispute then, on Friday afternoon, while his vessel was still afloat, the master had actual knowledge that his vessel must rest on the bottom at low water, and that that bottom was not level, but had an inequality of height of two or three feet.

### **Sixth Point.**

Not only is the case one in which a master of a vessel, knowing on Friday afternoon that the bottom of the berth in which she lies is uneven, having an inequality of two or three feet, and knowing that his vessel must at low tide touch bottom, does not remove her from the berth, but leaves her there and continues to take in cargo till she does touch, but it is a case in which it furthermore appears that on Saturday afternoon the vessel was actually touching bottom at low tide and lying unevenly on the bottom, and the master knew it, and still did not remove her from the berth when he could have done so, but allowed her to come down a second time upon the inequality which had raised the stern of his vessel two feet at the previous low tide.

(1). It is shown without dispute by the evidence of Capt. Hankins that, on Saturday afternoon when they knocked off work, he saw that his vessel, having 300 tons of cargo in aft and only 100 tons in forward was *down by the head* 20 inches or 2 feet, drawing 12 feet 10 inches forward and about 10 feet 10 inches aft. (See evidence under No. 12, *Ante.*).

(2). And it is proved by the evidence of the libellants' witness, Stephen W. Smith (although it needs

no evidence to prove it) that this fact *demonstrates* that the vessel was then resting on something aft of amidships. (See *Ante.*, No. 14).

(3). The master apparently claims that the necessary conclusion to be drawn from this fact is affected by a conversation which he says he had with Speaker, the foreman. He says that when he saw that his vessel was thus down by the head "he asked Mr. Speaker if she *was not on something*, that she seemed to tip too much" (fol. 73), and that Speaker said, No! she was on nothing.

Mr. Speaker gives a very different story as to the conversation (fol. 602) and denies positively that he said any such thing (fol. 608).

But, if we take it to have occurred exactly as Capt. Hankins says, it makes no difference. For Capt. Hankins could not have believed that the vessel was not touching bottom, *whatever any one said about it*. Nothing else except her resting on something could possibly lift her stern two feet.

(4). It is true that when Capt. Hankins, after he had testified that the vessel was from 20 to 24 inches down by the head, was asked if she was afloat, he answered :

"I don't know whether she was, when we knocked off, or not." (Fol. 98).

If there could be any other possible explanation of the fact that the stern of the vessel, with 300 tons of stone in her aft, and 100 tons forward, was lifted two feet out of the water at the stern, except that she was held up by something, this statement of the master, that he *did not know* whether she was afloat or not, might possibly be accepted. But, there being no other possible explanation, this statement of his is substantially false. His further testimony shows it; for the question is put immediately. (Folio 98).

Q. What is your best knowledge? A. I think she was not afloat.

And again :

Q. Your own opinion was she touched? A. I thought so before I sounded.

And he testifies that:

I asked Mr. Speaker if she didn't touch something, and he said, No. And that was the reason I sounded after six o'clock. And after I sounded it convinced me she was afloat, because I didn't strike any shallower water than what floated her.

It is too obvious to require discussion, that when the master concedes that he thought she touched because she was down by the head, there was nothing in the fact of the depth of water which he found *outside of the vessel* which had any bearing whatever on the question of whether she was aground. If she was aground she was on something *under her bottom*, which would not be affected by the depth of water outside of the vessel.

(5). Moreover as to the conversation between the captain and Speaker.

It is quite plain that Speaker had no knowledge at the time of that conversation of the controlling fact, viz., *that the vessel was down by the head*, while the captain knew by the marks of the vessel that she was nearly two feet down by the head. He says he did not have to look at the measurements, *he knew by the marks*. "All you had to do was to look at the marks" (fol. 96). Of the marks Mr. Speaker knew nothing, and the captain did not tell him. Mr. Speaker was not informed, therefore, of the controlling fact as to the situation of the vessel. Moreover, it does not matter what Mr. Speaker or any one else said at that time. The captain knew that his vessel, with three hundred tons of cargo aft, and only one hundred tons of cargo forward, was down by the head nearly two feet. He knew, therefore, that something under that vessel was lifting her stern out of the water two feet. That fact was not affected at all, either by what anyone said to him or by his afterwards sounding alongside of

his vessel, as he says he did. The object which she rested on was under her and lifted her, *whatever the depth of water was outside of her.*

(6). There is no dispute but that it was then understood by the master that, before any more cargo was put in her, the vessel must be moved out. (See *Ante* No. 15.) Why was this? No reason can be suggested except that she was then touching bottom.

(7). The Court below disposes of this branch of the case as follows (p. 696): "There is an entire failure of evidence, to establish the fact as attempted to be shown by the appellants, that there was want of due care on the part of the master, and a failure to exercise proper supervision for the safety of the vessel while she was moored at the wharf, for the purpose of being loaded."

It is incomprehensible to me that the Court could have come to such a conclusion. For there is absolutely no dispute as to the facts which we have above set forth, namely, the knowledge of the mate and of the captain, as to the depth of the water resulting from their soundings, and their knowledge of the fall of the tide. Nor is there any dispute as to the knowledge by the master that his vessel's stern was lifted two feet out of the water on Saturday afternoon, by reason of her resting on an inequality of the bottom.

If the Court below overlooked this evidence, it made a great error in saying that there was a *failure of evidence* on this point.

If the Court below perceived these facts, and still held that the master exercised due care in allowing his vessel to come upon the obstructions the second time, that surely was a very great error as to the law. No case can be found to sustain such a proposition, and the authorities lay down an exactly opposite rule.

### Seventh Point.

The law, as laid down by the Court below, as well as the cases cited by it, is applicable to the case of a vessel brought into a berth and there injured by an obstruction in the bottom of the berth which is, or ought to have been, known to the owner of the wharf, *but is not known to the master of the vessel*. And in that case the law is laid down that the owner of the wharf, and not the vessel, is liable for injury which is received by her by reason of the obstruction.

But the question which arises in this case is not whether the owner of a wharf is liable for injury to a vessel coming to a berth alongside his wharf, by reason of an obstruction, *of which the master of the vessel is ignorant till his vessel has received the injury*.

The question here is whether the owner of a wharf is liable for injury caused to a vessel in a berth alongside the wharf by her *coming a second time* on an obstruction, which is known to her master to exist—known to him, because his vessel *has rested on it once*.

The master of the *Tobin* had notice on Friday afternoon that his vessel would touch bottom at low water, if she drew 13 feet. He knew on Saturday afternoon that she had touched, drawing 12.10 forward and 11 feet aft, so as to lift her stern two feet out of water.

We insist that it then became the master's duty to remove his vessel from that situation at the first opportunity, namely, sometime during the next high tide. He was bound to know that, if he left her in the same place until the next low tide, she would again rest upon the same obstruction, which would lift her stern again two feet out of the water. It needs no argument to show that that would be a dangerous thing for any vessel, and that the natural thing to be expected from such a situation would be that, even if a vessel had been able to stand the



strain of lying in such a position on that tide, she might not stand a repetition of it, especially in the face of the fact that the rise and fall of the tide was not exactly uniform. The master of the vessel, therefore, was required, when he knew that his vessel was thus resting on an obstruction which lifted her stern two feet out of the water, to take measures to remove the vessel from danger of being injured by reason of her coming down on the obstruction a second time; and if he chose not to remove her, he took the risk of her receiving injury by that second resting on the rock.

### **Elighth Point.**

The rule applicable here is laid down in many authorities.

"If the plaintiff sees or by ordinary care could see, that the defendant has in fact negligently exposed him to the risk of injury, he can no longer rely on the presumption that the defendant has acted with due care, *and must use all the additional precautions on his own part, which a person of ordinary prudence would use in view of the circumstances as they are and not as they ought to be.*"

Shearman & R. on Neg., § 92.

That rule is exactly applicable to the present case. The libellants charge that the owner of the wharf was negligent in not having procured water enough in the berth to enable this vessel to lie afloat drawing 14½ feet of water.

But the master knew Saturday afternoon, that there was not water enough in the berth to allow his vessel to lie afloat drawing 12 feet 10 inches forward and 11 feet aft. Then he could not longer rely on the defendants' care. He was bound to take the

very obvious precaution of moving his vessel away from the berth at the first opportunity.

And the authorities cited by the Court below are not inconsistent with this.

In the cases of *Sawyer v. Oakman*, 1 Lowell, 134 ; *The Pennsylvania R. R. Co. v. Atha*, 22 Fed. Rep., 920 ; *Leonard v. Decker*, 22 Fed. Rep., 741 ; *O'Rourke v. Peck*, 40 Fed. Rep., 907 ; *The Annie R. Lewis*, 50 Fed. Rep., 556 ; *Barber v. Abendroth*, 102 N. Y., 406, and *Carleton v. Franc I. & S. Co.*, 99 Mass., 219, it is expressly found that the master of the vessel was ignorant of the danger in the berth *until the vessel had received the injury*. In the case of *Christian v. Van Tassel*, 12 Fed. Rep., 884, and *The Union Ice Co. v. Crowell*, 55 Fed. Rep., 87, the master being shown to have had knowledge of the obstruction, the vessel was held in fault for his negligence in allowing his vessel to come on the obstruction.

And an exactly parallel case to this is the case of *Peterson v. The Great Neck Dock Company*, 75 Fed. Rep., p. 683. In that case the vessel was a canal boat which came alongside a wharf to discharge. On one side of the wharf stones had fallen out, which were under the water. The canal boat, as the tide fell, got caught on them, but came off from them on the rising tide, without injury. The next morning she came to the same berth and remained discharging until at low tide she got on the stones again, and was considerably injured. The Court held that, as the master had been on those rocks without injury in that same berth and as, if he had hauled his boat out of the berth before the tide, he would have received no injury, the cause of the accident was "his own negligence in assuming that the tide would rise on the 7th as it did on the 6th." And the Court says : "He was not justified in so assuming, and his acting on this assumption and failing to haul the boat before the tide fell, was the negligence which caused the damage. The master had a right to assume that the berth was clear of stones ; but the proof is

that he not only examined the bottom himself, but had been notified of the existence of stones there, and he had actually been on some of them the day before. Knowing this he had no right to assume that the dock was clear. In fact he did not act on any such assumption, because he knew to the contrary. What he did assume was that the tide would rise as high on the 7th as it did on the 6th. This he had no right to assume. His duty was to watch the tide, and to haul his boat in time to prevent his boat from catching on the stones which he knew to be there. His failure to watch the tide and to move his boat when he saw it was falling, was negligence, and the negligence which caused the accident." And the libel against the wharfinger was dismissed.

Another exactly similar case is the case of *Washington v. The Staten Island &c. Co.*, (68 Hun 87), in which the owner of a canal boat knowing, that his boat came on the bottom of the berth at low tide, did not remove her. The New York Appellate Division decided against him, saying "no case can be found, where after the master of the boat has learned of the defect and still persists in imperilling his boat by the use of the dock, he has a right to recover the voluntary injury sustained after he knew of the imperfection."

See also the case of *Nelson v. The Phoenix China Works*, 7 Ben. R. 37.

### **Ninth Point.**

The reason of the rule is obvious. The proximate cause of the loss here was not the mere presence of the rock. If the vessel had been injured the first time she touched bottom, the case would be different. But the cause of the vessel's being injured *at the second time* was the Master's negligence in not removing her from a danger whose presence he knew.

"If plaintiff having full knowledge of the existence of the defect in the machinery complained of nevertheless continued to use the machinery until the happening of the accident, the defendant is not chargeable with the consequences resulting therefrom.

Odell v. N. Y. C. and Co., 120 N. Y., 325.

Similar questions have often come before the Courts in collision cases and the same rule has always been laid down.

"A. can recover nothing, though B. was guilty of negligence contributing to the collision, *if A, by ordinary care exerted up to the moment of the collision, could have avoided it.*"

Marsden on Collisions (3 Ed., p. 23).

"An antecedent act of negligence is remote when notwithstanding it, the other vessel, by the exercise of ordinary care, can avoid a collision."

The Portia, 64 F. R., 811.

"Ordinarily an act though negligent is not the proximate cause of an injury when, but for the intervening negligence of another, the injury would not have been inflicted."

The Garden City, 67 F. R., 368.

### **Tenth Point.**

And finally, to sum up all, even if we were to concede the existence of the rock, as the libellants claim it; even if we were to concede the representation as to the depth of water which the libellants allege, still in face of the following undisputed facts: (1st) That the master was instructed to sound for himself from time to time; (2d) that both he and the mate did sound from time to time; (3d) that on Friday

afternoon both the master and mate learned by their own soundings that there was not as great a depth of water in the berth as they claim to have been told that there was, and that the vessel would touch bottom at low tide, and that the bottom was uneven, having an inequality of two and a half to three feet under the vessel ; (4th) that on Saturday afternoon the vessel with 300 tons of cargo in her aft and only 100 tons forward was down by the head about two feet, drawing only 12 feet 10 inches forward and about 11 feet aft, and therefore was resting on something under her which lifted her stern two feet ; (5th) that the vessel, however, did not at that tide receive any injury ; (6th) that the tide had a rise of three to three and a half feet ; (7th) that the master did not move his vessel at any part of the following high tide, but allowed her to come down a second time on the obstruction which had thus lifted her stern at the previous low tide, as a result of which she was injured—in view of these facts one of two things must be held, viz, either that there was no negligence in the master's allowing his vessel to come a second time on a rock, although its existence there is claimed to prove negligence on the part of the wharf owner, or else that the decree in this case is wrong and must be reversed.

A writer discussing this question has very well said :

“ The Party who last has a clear opportunity of avoiding the accident notwithstanding the negligence of his opponent, is considered solely responsible for it.”

Quarterly Law Review, Vol. 11, p. 507  
(1886).

And there can be no dispute that the master of the Tobin was the last who “ had a clear opportunity of avoiding this accident.” He chose to go to sleep instead of availing himself of the opportunity, and the libellants therefore are to be “ considered solely responsible for it.”

**Eleventh Point.**

The decree below should be reversed and the libel in favor of the owners of the Tobin should be dismissed, with costs.

The decree dismissing the libel against the owners of the vessel should also be reversed and the cause remanded for further proceedings.

EDWARDS & BARNARD,  
For Appellants.

NATHANIEL WILSON,  
ROBERT D. BENEDICT,  
Advocates.

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U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA  
Charles Edwards and Charles G. Edwards, Jr., Appellants.

Charles Edwards, acting as the own bond,  
Charles Edwards and Charles G. Edwards, Jr., et al.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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## SUPPLEMENTAL BRIEF FOR APPELLANTS.

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JAMES S. EDWARDS,  
JOHN BARNARD,  
*Attorneys for Appellants.*

NATHAN WILSON,  
ROBERT D. BENEDICT,  
*of Counsel.*



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1898.

---

CHARLES G. SMITH and CHARLES G.  
SMITH, Junior, Appellants,

vs.

CHARLES BURNETT, suing on his own  
behalf, CHARLES BURNETT and  
CHARLES G. ENDICOTT, etc., *et al.*

No. 112.

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**Appeal from the Court of Appeals of the District  
of Columbia.**

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**Supplemental Brief for Appellants.**

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**First.**

It is claimed in behalf of the appellees that, there having been no findings of fact by the Court of Appeals, this Court can not consider or inquire into the facts, but has only to determine whether upon the record there is error. This claim is based upon the idea that appeals from the Court of Appeals of the District of Columbia are governed by the provision in the Act of February 16, 1875, as to appeals from the Circuit Court of the United States to the Supreme Court.

We think this claim is clearly without foundation.

Section 705 of the Revised Statutes provided that judgments and decrees of the Supreme Court of the District of Columbia might be reviewed "in the same manner and under the same regulations as are provided in cases of writs of error on *judgments or appeals from decrees in a Circuit Court.*"

And the eighth section of the Act of February 9, 1893 (27 Stats. at L., 434), which established the Court of Appeals of the District of Columbia, provided for a review of its judgments and decrees "in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia."

The question therefore is this, What was the manner and what were the regulations which at the time of the passage of that act had been provided for "*appeals from decrees in a Circuit Court of the United States?*"

Those appeals were not at that time (February 9, 1893) provided for or regulated by the Act of February 16, 1875. They were provided for by the Act of March 3, 1891, which established the Circuit Courts of Appeals.

By that statute it was provided (section 6) that—

"the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Court and *the existing Circuit Courts* in all cases other than those provided for by the preceding section of this act."

The preceding section does not refer to such cases as the present.

It is the practice, therefore, as to the review of a decree of the Circuit Court by the Circuit Court of Appeals which was, by section 8 of the Act of February 9, 1893, provided to be the practice on a review of the decree of the Court of Appeals of the District of Columbia.

It needs no citation of authorities to show that no findings of fact were required on appeals from decrees of the Circuit Court to the Circuit Court of Appeals. Many, if not all of the Circuit Courts of the United States, at the time of the passage of the act creating the Circuit Courts of Appeals of the United States, had admiralty cases before them undecided, which were afterwards decided, and then appealed to the Circuit Court of Appeals. In the Second Circuit there were twenty-four such cases so appealed and disposed of. They are all reported in the first volume of the United States Appeals. No findings of fact were required in any of those cases in order to their being reviewed by the Circuit Court of Appeals. And in all those cases the Circuit Court of Appeals held that the whole case was open for them upon the facts, as well as the law.

The question was brought up before the Circuit Court of Appeals at once, in the case of *The Havilah* (1 U. S. Appeals, p. 1), and was so expressly decided; and the same decision was made in the First Circuit, *The Philadelphia* (60 Fed. Rep., 243), and in the Ninth Circuit, *The State of California* (49 Fed. Rep., 174).

When the Revised Statutes were passed, the only appeal from a decree of the Circuit Court in Admiralty was to the Supreme Court of the United States. Any statute providing for that appeal was of course required

to be followed in respect to appeals from the Supreme Court of the District of Columbia. The practice on such appeal was undoubtedly governed by the Act of 1875, until the passage of the Act of March 3, 1891. But that act, establishing the Circuit Courts of Appeals, provided for a different appeal from decrees of the Circuit Courts, and a different manner and different regulations of reviewing on that appeal the decrees of the Circuit Courts.

Thereafter, appeals from decrees of the Supreme Court of the District of Columbia were required to be taken as appeals from decrees of a Circuit Court to the Circuit Court of Appeals were required to be taken. And when the Act of February 9, 1893, was passed to establish the Court of Appeals of the District of Columbia, it was the practice on appeals from a Circuit Court to the Circuit Court of Appeals which was made applicable to appeals from its decrees to the Supreme Court of the United States.

The appeal in this case conforms to that practice. And the power of this court to consider the case must be the same as was the power of the Circuit Courts of Appeals to review decrees of the Circuit Courts of the United States in admiralty which were brought before them by appeal, viz., to review the whole case, which is the true function and meaning of an "appeal."

### **Second.**

(a) The appellees' brief seems to be based on the idea that it is important to allege and claim that the captain was advised "to sound *around* the vessel" (Brief, p. 34),

and that the wharf owners intended "to give the impression that the only precaution he needed to take was to sound *around* his vessel." (Brief, p. 35.)

There are three suggestions which we wish to make in answer.

1. This is not a fair statement of the evidence.

When Hankins was first examined he said (fol. 72), "Mr. Smith told me he would like me to *make some soundings* for myself." The words "around my vessel" do not appear.

On cross-examination, when asked to give Mr. Smith's exact words, he said (fol. 85): "He says \* \* \* but I would like you to *make some soundings* for yourself."

Again the words "around my vessel" are absent.

Again, at (fol. 122), he said, "He told me he would like me to *make some soundings* around for myself." Here it is "soundings around," and not "around my vessel."

Then Lee was called, and testified (fol. 129), "Mr. Smith said to him, I want you to *make some soundings for yourself*, and our superintendent will help you to place the vessel." And again (fol. 138), "He asked the captain to *sound for himself*."

Then Smith testified (fol. 516), "I told him I did not know just what the bottom was, but that I *would advise him to make his soundings there*, and to find out from time to time just how his vessel was laying, and that I would see he had any assistance he wished in moving the vessel forward or aft or shoving her out."

And on cross-examination (fol. 567), "I told *him* to *sound*."

Then Hankins was recalled, and says: "Mr. Smith told me he would like (*me*) to *make some soundings*." And then in answer to the direct question by his counsel, "Where did he say to sound?" he answers, "Around the vessel," which is the first and only time that any such expression was spoken of.

Three times Hankins had said that Smith said he wanted him to make soundings. Lee, this libellants' witness, had said the same thing, and Smith had confirmed them both.

Hankins' last different statement as to the language used is not to be taken. It is certainly not of weight enough to justify putting the word "around" into italics, and claiming that it was intended that the captain should understand that he need take no precaution as to the depth of the water under his vessel. It was only the depth of water under his vessel that was of the slightest consequence. It was only in reference to the depth of water under his vessel from time to time, that Smith told him to make soundings.

2. This conversation was on Friday morning. The vessel was not moved till Friday afternoon.

If it were to be taken, as the appellants' brief says, "that what Mr. Smith advised the captain to do was to sound *around* the vessel as she lay at that time," it is beyond dispute that the captain did not sound around her "as she lay *at that time*." He directed the mate to

sound if he hauled the vessel when the captain was not there. (Fol. 72.)

But the mate did not. He hauled the vessel that Friday afternoon, and then sounded. (Twilford, fol. 236.)

3. It is plain that the force to be fairly given to the language of Mr. Smith to the captain, was that he notified the captain that he must not rely upon any certain depth of water under his vessel, or any certain kind of bottom for himself, and must rely on the information which he should obtain for himself on these points.

(b) The appellees' brief seeks to convey the idea that, at the conversation on Saturday afternoon, the captain did not know how much stone was in the vessel, and where it had been put. (Brief, pp. 55, 56.)

Apparently Hankins' evidence was overlooked where he says, in answer to the question as to how many tons of stone he had aboard on Friday night: "All I could tell was *what they told me at the stone-crusher on the wharf. They said they had near*"—and here he was stopped, and did not testify to what was told him.

But this proves that on Friday night he was told how much stone had been put in. And he knew just how long the stone had been going in at the after hatch, and how long at the forward hatch. And even the appellees' brief concedes that the master "had the impression" (Brief, p. 47), "that more cargo had been put in aft than forward," and that the master did "attribute the vessel's being by the head to her touching the ground."



(c) But the brief then proceeds to claim that the master communicated to Mr. Speaker the fact that the vessel *was down by the head*, and his idea that she was touching.

This is an error. It is plain that all that the captain communicated to Mr. Speaker was his apprehension that she was touching, and not at all the fact that she was down by the head. So that Speaker's idea was that the captain thought she was touching *forward*, whereas her being down by the head had showed to the captain that she was on something not *forward*, but *aft*.

This is plain by Speaker's answer, as Hankins gives it. He says: "I asked Speaker if she was not on something. I thought she seemed to tip too much. He told me no, that she was on nothing." He says, "*Forward of the piling, that fourth piling*, where it had been dug out, you won't touch her, if you are full loaded, with the lowest tides." (Fol. 73.)

Plainly, Speaker was speaking of the depth of water forward, not aft. And he must have understood the master therefore as thinking that the vessel was touching *forward*, not *aft*.

And forward, as the master found by his soundings, there was in fact 16 or 17 feet of water. (Fol. 73.)

This demonstrates that the captain did not tell Speaker that she was down by the head.

(d) The brief is in error in saying that Speaker "admits that the captain called his attention to *her being down by the head*." (Brief, p. 48.) Speaker's evidence is—

"Did you not say that he was tipping by the

head?—A. No, sir; I did not say he was tipping by the head. I did not see it until the captain called my attention to it, and *I ain't seen it yet*—that she was ever tipping by the head.

“Q. The captain did call your attention to it?—

A. *He called my attention*—he said he thought she was ebbing out.”

The fair meaning of this evidence is that the captain spoke to Speaker about her tipping (not about her being down by the head), which he thought was due to her touching something. And that Speaker, understanding that the captain thought she was touching *forward*, answered as to the depth of water *forward*, as showing that she could not be touching *forward*.

But the master knew by the marks on the schooner that she was down by the head, which Speaker did not know. And he knew therefore that she was on something aft, which held up her stern.

No sounding around the vessel could affect that fact.

(e) The appellees' brief (p. 55) speaks of the master's "judgment as to the effect of the cargo put on board in making her tip forward." But the master did not have a judgment that this tipping was due to "the effect of the cargo," based on "a rough estimate of the relative amounts put in forward and aft."

His judgment, both then and when he was examined, was that she tipped *because she touched the bottom*. (Fol. 96.)

(f) Appellee's brief (p. 55) says that the captain "*had no reason to suppose that there was any obstruction under*

*the vessel of which he was not informed."* But he had conclusive reason for supposing not merely, but *knowing* that there was an obstruction under his vessel, *of which he was informed* as soon as he saw by the marks on his vessel that she was two feet down by the head.

NATHL. WILSON,  
ROBERT D. BENEDICT,  
*of Counsel for Appellants.*

JAMES S. EDWARDS,  
JOB BARNARD,  
*Proctors for Appellants.*

OFFICE SUPREME COURT U. S.  
FILED

DEC 30 1898

JAMES H. MCKENNEY,  
Clerk.

No. 112.

*Brief of Choate for Appellees*

*Filed Dec. 30, 1898.*

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 112.

CHARLES G. SMITH AND CHARLES G. SMITH, JUNIOR,  
*Appellants,*

*vs.*

CHARLES BURNETT, SUING ON HIS OWN BEHALF, AND SAID  
CHARLES BURNETT AND CHARLES G. ENDICOTT, EX-  
ECUTORS OF HARRIET E. BURNETT, DECEASED, ET AL.,  
*Appellees.*

**BRIEF FOR APPELLEES.**

WM. G. CHOATE,  
*Of Counsel.*



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# Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 112.

CHARLES G. SMITH and CHARLES G.  
SMITH, Junior,  
Appellants,

AGAINST

CHARLES BURNETT, suing on his own  
behalf, and said CHARLES BURNETT  
and CHARLES G. ENDICOTT, Executors  
of Harriet E. Burnett, deceased,  
*et al.*,  
Appellees.

## BRIEF FOR APPELLEES.

### Statement.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District of Columbia, sitting in admiralty, whereby the appellees, original libellants in the cause, are awarded as damages \$9,260, with interest and costs, and a cross-libel filed in the cause by the appellants was dismissed.

Final decree, March 3, 1896, p. 686,  
fol. 1235.

Decree of Affirmance, April 6, 1897, p.  
699.

THE NATURE OF THE ACTION, AND THE ISSUES, AS  
SHOWN BY THE PLEADINGS.

The original libel was filed on behalf of the owners of the schooner *Ellen Tobin*, to recover damages for a maritime tort (p. 2, fol. 3). It alleges that on the 2d of August, 1893, the schooner sailed from Fort Washington, on the Potomac River, for the port of Georgetown, in the District of Columbia, for the purpose of there being loaded, under an oral contract or oral charter made with the appellants, with about 600 tons of crushed stone, which, by the terms of the contract, was to be loaded by the appellants at a certain wharf in Georgetown then held, together with the water rights and berth connected therewith, by the appellants under lease, and taken to Fortress Monroe and there unloaded by the appellants, at the price to be paid to the schooner of 50 cents per ton; that the schooner was seaworthy and staunch and suitable for the service; that she was taken to the said wharf after the master had been informed by the foreman of the appellants that it contained  $14\frac{1}{2}$  to 15 feet of water at low tide, and placed under a chute connected with the works of the appellants on said wharf by which the stone was to be loaded into her hold, and then she was breasted off from the wharf so that this chute could be passed down into her for the purpose of loading (p. 3, fols. 3 and 4); that the appellants, through their foreman and workmen, proceeded to load the vessel, beginning at the after part, and continued their loading till about 400 tons of stone had been loaded upon her and until the afternoon of Saturday, the 5th of August, when that amount had been put on board; that the appellants negligently allowed a natural rock, stones or other substances to remain in said berth under said vessel, so that even with the 400 tons on board, said berth did not contain a sufficient depth of water to float her, and that in consequence thereof she became a total loss; that the loss was caused by the negligence and

want of proper care on the part of the appellants and not from any omission or neglect on the part of the vessel, her owners or masters (p. 3, fols. 4-6). The value of the vessel is stated in the libel to be \$10,000, and additional damage is claimed to the amount of \$1,240 for pumping out the crushed stone and raising and taking the vessel out of navigable waters, as required by statute (p. 4, fol. 6).

The libel then states the circumstances which excused the delay in the removal of the vessel and the difficulties which the appellees encountered in getting the work of discharging and removing her accomplished (pp. 4 and 5, fols. 6 and 7).

It recites the survey of the vessel on the 1st of November, 1893, by three experienced surveyors, a copy of which survey is annexed to the libel (p. 5, fol. 8; survey, p. 11, fols. 16 to 18). By the survey she was found to be a total wreck.

The libel then states that she was sold at public auction on the 14th of November, 1893, to one of the libellants for \$25, who, thereafter, on behalf of the owners, sold her to one John B. Lord for \$100, which sum the libellant's offer to have credited against their loss, less the cost of advertisement (p. 6, fol. 8).

Attached to the libel is a copy of the lease of the appellants (pp. 8 and 9); also an agreement on the part of the appellants, dated September 23d, to receive the stone when taken out of the vessel, on payment to the appellants of \$40 for the work of handling the stone after being discharged at their wharf (p. 10, fol. 15). This last agreement was without prejudice to the rights of either party in this controversy, except that appellants waive any damages to the stone to be so returned (fol. 15).

The answer of the appellants to the libel, besides putting the libellants to the proof of their ownership and of most of the averments of the libel contains the following denials and admissions:

They deny that prior to the sailing of the vessel from Washington there was an oral contract or

charter for the loading of the schooner (p. 15, fol. 22).

They admit the lease, a copy of which is annexed to the libel (do. do.).

They deny that the vessel was seaworthy, staunch and suitable for the service mentioned (do. do.).

They deny that the master made proper inquiry with regard to the depth of the water in the berth in front of the wharf (p. 15, fol. 23).

They deny that the foreman of the appellants informed the master that there was  $14\frac{1}{2}$  to 15 feet of water at low tide or any other number of feet (do. do.).

They admit that after the arrival of the schooner at the wharf the work of putting the stone on board was begun and carried on by the appellants, but they allege that the storage of the same on board and the quantity placed and the distribution of it in the hold were under the sole direction of the master (do. do.).

They admit that a lighter was interposed between the wharf and schooner to keep the schooner breasted out from said wharf, so that a chute for the conveyance of the stone from the crusher could be passed down into the schooner for the purpose of loading her (do. do.).

They admit that the loading began in the after part of the vessel, and that the loading was continued until about five o'clock on the afternoon of Saturday, August 5th (do. do.).

They deny that the bottom of the berth was obstructed by natural rocks, stones or other obstruction which had been negligently allowed to remain by the appellants, and that the back of the schooner was broken by reason of the said obstruction coming in contact with the bottom of the vessel through the careless, negligent, unskillful and improper management of said wharf and berth by said appellants in not keeping said berth free from obstructions.

They deny that the schooner became a total loss to the libellants by reason of the respondents' alleged careless, negligent, unskillful and improper management (p. 16, fol. 24).

They deny the alleged value of the schooner (p. 16, fol. 25).

They deny the damage of \$1,240, the alleged cost of removal, in addition to the value of the schooner (p. 16, fol. 25).

They neither admit nor deny the allegations of the libel tending to excuse the delay of the libellants in the removal of the vessel, and require proof (p. 16, fol. 25).

They deny that the survey held was entitled to any consideration (p. 16, fol. 25).

They allege that they had no knowledge or notice of the existence of any dangerous obstruction or of any natural rock or stone at the bottom of the berth or dock of such a character as to threaten or cause injury to any vessel grounding or settling in the berth or dock; they allege that they had caused the dock to be dredged in the spring of 1893, and had exercised proper and usual care in making the berth or dock a safe place for loading a vessel.

They allege that on or about the 2d of August an agreement was entered into by and between themselves and the master, whereby the master agreed to receive at his said wharf and convey to Fortress Monroe a cargo of crushed stone at and for the compensation of 50 cents per ton freight; that the number of tons constituting the cargo was not agreed upon, but was left to the determination of the master in the exercise of his discretion (p. 17, fol. 26); that this agreement contained no guarantee or representation as to the depth of water (p. 17, fol. 26).

They further allege that on Friday, the 4th of August, the schooner being then partly loaded, one of the appellants, Charles G. Smith, Jr., told the master it would be wise for him to sound around his vessel, to make sure that she was lying all right;

that although the dock had been dredged out in the early part of the year, the appellants did not know just what the bottom was, although they thought it was all right, and that he would advise the master to sound, and satisfy himself as to the depth of water; that the loading of the schooner proceeded under the direction of the master until about five o'clock on Saturday afternoon, August 5th, when the tide being nearly low, the master said he was touching bottom slightly, and thereupon the work of loading ceased and was not resumed; that the master said she was all right and he would shove the vessel off at high water, the tide being high at about midnight; that the appellants by their foreman advised and urged the master to shove her off at high tide and place another scow between the schooner and the wharf, and that the foreman prepared and placed in position another scow, to be placed between the schooner and the scow then next to the wharf, and informed the master that if any more stone were taken on board it could be wheeled over the two scows, and that the master then declared that he would shove the vessel off at high tide and place the scow beside her, and requested that the iron chute which carried the stone to the schooner should be removed in order that the schooner might be shoved off, and this was accordingly done by the appellants' employees; that at this time the master said the schooner was leaking; that although the schooner was floating that Saturday night at high tide, no effort was made by the master to shove her off or to interpose the other scow between her and the scow at the wharf then or during the night of Saturday, or to pump the water out of said schooner, or to stop the entrance of water into her hold or to ascertain her position or protect her from injury by leakage and the consequences thereof; that the pumping was begun about half-past eight on Sunday morning, and continued some hours, but the schooner continued slowly to sink until noon on Sunday, when the pumping was stopped

(pp. 17 and 18, fols. 27 and 28); that the sinking of the schooner and all the losses thereby occasioned were caused solely by the negligence and want of skill and care on the part of the said master in not ascertaining the condition of the bottom of the berth or dock, and in not shoving the schooner off into deeper water when advised to do so, and in not placing an additional scow between the schooner and wharf when urged to do so, a scow being provided for that purpose by the respondents, and in not pumping the schooner when found to be in a leaky condition, and in not taking any measures to prevent the vessel from sinking when it was known she was leaking (p. 18, fol. 29).

They further aver, that after the schooner sunk, she was allowed to remain there until November 23, 1893, and during that time no proper or usual means were taken to raise her or prevent her becoming a total loss, although if prompt and skillful effort had been made to raise and repair her, the greater part of the loss would have been avoided (p. 19, fol. 29).

These appellants filed a cross-libel (p. 20) containing many of the averments contained in their answer alleging that the schooner began to leak and sank in her berth on the 6th day of August, by reason of the negligence of the master in not pumping her out, in not placing her in a place of safety; in failing to take proper measures to ascertain the condition of the bottom of the berth, and to avoid the danger of injury which the master would have discovered if he had made proper soundings and examinations of said berth, dock and bottom; that the owners and the master neglected to take proper measures for the raising and removal of the schooner from the dock and berth, and negligently suffered her to remain there from the 6th of August to the 23d of November, 1893 (p. 21, fol. 32), and that she became an obstruction to the use and occupation of the berth and dock, and prevented the loading and unloading of stone therefrom, and increased the cost of loading said stone therefrom, and increased the cost of



getting the stone to the crushers on the wharf to the damage of the appellants of \$2,500 (p. 21, fol. 33); that further damage was done by one of the appellants' scows coming in contact with the anchor of the schooner to their damage \$200 (p. 21, fol. 33), and the libel claims damages in \$2,700 against the original libellants (p. 22, fol. 33).

The answer of the appellees to the cross-libel denies all the allegations of negligence charged against the master and owners of the schooner; denies the damages alleged to have been suffered by the appellants; denies that the injury done by the anchor of the schooner was caused through any negligence on their part; denies any unnecessary delay in removal of the schooner (pp. 25 to 29).

The testimony taken under the pleadings is very voluminous, 70 witnesses having been examined, many of them at great length, and there being on some points great conflict in the evidence, especially as to conversations between one of the appellants, Charles G. Smith, Jr., and the foreman of the appellants, Speaker, and the master. The trial, however, resulted in a decree, as before stated, in favor of the libellants, appellees herein, and by an interlocutory decree it was referred to a special commissioner to assess the libellants' damages (p. 584, fol. 1049).

The testimony taken before the Special Commissioner was also very voluminous. It related especially to the valuation of the schooner, the libellants insisting that she was of the value of \$10,000; the respondents, these appellants, admitting and contending that she was worth only a little over \$4,000. The Special Commissioner found her value to be \$6,000, and allowed the additional damages claimed at \$1,240 (Report, pp. 586 to 591).

Both parties filed exceptions to the report, the libellants, appellees herein, claiming that they

should have been allowed \$10,000 instead of \$6,000 (Libellants' Exceptions, pp. 653 to 658).

The appellants, respondents below, also filed exceptions, among other things, to the allowance of \$6,000 for value (pp. 659, 660).

Upon the hearing of the exceptions, the Court, being of opinion that the Special Commissioner had rejected evidence on behalf of the libellants which should have been received, took further testimony in open court (Order, p. 661, fol. 1189; Testimony, pp. 661 to 685), and determined that the value of the schooner was \$8,000, as is stated in the final decree (p. 686, fol. 1236).

The respondents, appellants herein, appealed to the Court of Appeals (p. 687, fol. 1237).

The Court of Appeals delivered a carefully written opinion, through Chief Justice Alvey, which discusses both the facts and the law (pp. 694 to 699), and gave judgment, as before stated, affirming the decree below.

#### THE FACTS AND THE EVIDENCE.

The principal questions of fact involved are the following:

1. What was the contract between the parties?
2. Was there a natural rock or other obstruction in the berth in which the vessel was placed to receive her cargo, rising above the level of the bottom at that place, so as to be dangerous to the vessel two-thirds loaded grounding on it?
3. Was the wreck of the vessel caused by this rock?
4. Was the vessel staunch, strong and seaworthy?
5. Had the appellants knowledge or notice of this obstruction in the berth, or were the circumstances such that it was negligence in them not to know of it?

6. Was the master chargeable with contributory negligence, which tended to produce the loss and damage, as charged in the answer, either

1st. In not ascertaining the condition of the bottom of the berth or dock (Ans., p. 18, fol. 29); or

2d. In not shoving the schooner further away from said wharf when advised to do so, and in not placing an additional scow provided for that purpose by appellants between the schooner and wharf (Ans., pp. 18 and 19, fol. 29); or

3d. In not pumping said schooner when found to be in a leaky condition (Ans., p. 19, fol. 29); or

4th. In not taking any measures to prevent said vessel from sinking, when it was known she was leaking (Ans., p. 19, fol. 29)?

7. Are the appellees, the owners of the vessel, chargeable with negligence in not more promptly raising and removing her, which aggravated the damages.

*I.—Of the contract between the parties.*

The contract alleged in the libel is virtually admitted in the pleadings of the appellants.

The libel alleges an "oral contract or oral charter" made by the appellants, through one Joseph H. Lee, with the master, and that the schooner sailed from Ft. Washington on the 2d of August for Georgetown, "for the purpose of there being loaded, under said contract or charter, with about 600 tons of crushed stone, which was to be loaded on her by the appellants at their wharf and discharged by them at Ft. Monroe" (fols. 3 and 4). "The appellants deny that prior to the sailing of the schooner

from Fort Washington they made any oral contract or charter for the loading of said schooner, as charged in said second article of said libel" (fol. 22). They also deny *that her being towed to Georgetown* was done in accordance with any oral charter (do.). They expressly allege, however, that on or about August 2, 1893, an agreement was entered into between them and the master, whereby the master agreed to receive and convey to Ft. Monroe a cargo of crushed stone at and for the compensation of fifty cents per ton for freight (fol. 26). They add that the number of tons to constitute the cargo was not agreed upon, but was left to the determination of the master in the exercise of his discretion. They add also that the oral agreement contained no representation or guaranty as to the depth of water, the position of the schooner at the wharf or the time and manner of receiving the cargo or storing it or the quantity to be received, all of which they say were under the exclusive direction and control of the master (fols. 26, 27).

In the cross-libel, however, they allege that "on the 2d of August the schooner, *then being in the port of Georgetown, then leased and in the possession of libellants (i. e. the appellants herein)*, and being commanded by one Hankins, master, an oral agreement was made by and between the libellants and the said master, acting on behalf of the owners of the schooner, by which the master agreed to receive at their wharf and to convey to Ft. Monroe a cargo of crushed stone at and for the compensation of fifty cents per ton" (p. 21, fols. 31, 32).

They do not deny that the contract was made as alleged by the appellees, through Lee. The evidence, however, is that the master made the contract, whatever it was, with Lee, and did not see either of the appellants till the day after the schooner begun to load, which was August 3d.

It is not claimed by the appellees that the oral contract contained anything expressly about the number of tons, or any guaranty about the depth of

water, or the position of the vessel at the wharf. It was simply an agreement to bring the vessel to the wharf to be loaded by the appellants, to convey the stone to Ft. Monroe, to be there by the appellants discharged. They do claim that representations were made by Lee about the depth of the water in conversation with the master at or about the time of making the contract and by the appellants afterwards. It is not, however, claimed that these representations were part of the contract by which the vessel was chartered or leased, as the cross-libel has it, to the appellants.

The admission is that the contract was for a *cargo*. This plainly means such amount as the vessel could properly take for carriage. It means a full cargo, considering the capacity of the vessel, not a part of a cargo.

The carrying capacity of the schooner was about 600 tons, the amount stated in the libel.

And it would seem that the refusal of the master to take or of the appellants to put on board substantially a full cargo would be a breach of the contract, as admitted.

Whether the schooner was *chartered* by the appellants or not is also immaterial. The cross-libel alleges that she was *leased* and in their possession. This is an admission that she was chartered by them.

But while there is no real question made by the pleadings as to the contract, yet when we come to the evidence, the appellants tried to raise such question, and the testimony of Charles G. Smith, Jr, one of the appellants on this very subject is such as to raise sharply the question of his general credibility, a question which the courts below had to consider, not only with reference to this subject, but with reference to many other more material parts of the evidence.

It having appeared that the master never met either of the appellants till after the 2d of August,

and that the conversation which resulted in the contract, admitted in the answer, was between the master and Lee alone, Smith as a witness sought to repudiate Lee's authority to act for him, and to deny that the appellants ever made any contract with the master (p. 292, fol. 515; p. 293, fol. 517; p. 330, fol. 586; p. 331, fol. 588; p. 332, fol. 590), and this in spite of the fact that vessels sent there by Lee were received and loaded by appellants, and with no other agreement than that Lee had engaged and sent them, on being notified that appellants had stone to ship, and agreed with the captains upon the rate of freight they were to receive (*Lee*, p. 86, fol. 137; p. 81, fol. 128; p. 82, fol. 130).

II.—*There was a rock or obstruction in the berth assigned to the vessel by the appellants projecting above the bottom of the river, and endangered her safety even in her partially loaded condition.*

The schooner being towed to Georgetown on Wednesday, the 2d of August, was moored at a wharf adjoining Smith's to await an opportunity for receiving her cargo, and just before they quit work on August 2d, the berth being vacant, she was hauled down, and with the help of Mr. Speaker, the appellant's foreman, and his employees, placed in her berth so that the chute from the crusher could deliver the stone into her after hatch. She lay outside of a scow or lighter, breasted off from the wharf, so that a lighter could be moved in and out between the schooner and the wharf (*Hankins*, pp. 45, 46, fols. 70, 71). She remained in this position all day Thursday and until about 2 o'clock Friday afternoon when she was hauled so as to bring the chute over the forward hatch (pp. 46, 47, fols. 72, 73; p. 66, fol. 104). She lay there receiving cargo all the rest of Friday after being hauled, and all day Saturday till about 5 o'clock in the afternoon (pp. 47, 48, fol. 73). Her regular full cargo was 575 tons of coal, or 600 tons of stone (p. 45, fol. 69). The estimated amount

of stone which the crusher could deliver per day, as stated to the master by Charles G. Smith, Jr., one of the appellants, was 150 tons (p. 46, fol. 72), and she had received by Saturday at 5 o'clock about 400 tons. They worked the after hatch from the beginning of work on Thursday to 2 o'clock Friday (p. 66, fol. 104), and the fore hatch from 2½ or 3 o'clock Friday to 5 o'clock Saturday.

When she went into her berth she drew 7 feet forward and 7 feet 10 inches aft (p. 60, fol. 93). On Friday, at 2½ o'clock in the afternoon, that is, just before she changed from the aft to the fore hatch, she drew 13 feet aft and about 8½ feet forward (p. 60, fol. 94). As they worked the forward hatch she was coming up on an even keel (p. 60, fol. 94). On Saturday, when they knocked off, she drew 12 feet 10 inches forward and 10 feet 10 inches aft (p. 61, fol. 95). This would make her drawing about 11 feet 10 inches amidships. This was about low water. The master thought she was on something because she was nearly two feet by the head (p. 62, fol. 97; p. 66, fol. 104), but he was reassured by the foreman, who said she was not (p. 47, fol. 73; p. 62, fol. 98), and then the master sounded on both sides and found not less than 12 feet on the inside aft and not less than 15 feet forward, from 14 to 17 or 18 feet. He found all around her more water than she drew. This convinced him she was afloat (pp. 62, 63, fols. 97, 98). As she lay she was 20 to 24 feet from the wharf, breasted off a little more at the stern than forward (p. 63, fols. 98, 99). Her length of keel was 125 feet; her width 32 feet (p. 75, fol. 118). On Saturday after they stopped work they pumped her out and found no water in her (*Hankins*, p. 62, fol. 97; p. 48, fol. 75; p. 55, fol. 86). In this the captain is confirmed by the crew. She sucked at 25 strokes as usual (*Barkley*, p. 31, fol. 47; *Stevens*, pp. 262, 263; *Thompson*, p. 267, fol. 470). On Sunday morning, August 6th, the captain, about 7½ or 8 o'clock, discovered that she was leaking on trying the pumps (p. 68, fol. 107).



He tried to breast her off and could not and found she was not afloat. She was still by the head (p. 68, fol. 108). The captain got up a little after 6 Sunday morning (p. 70, fol. 110). He took note of the condition of the vessel. She still drew the same forward and aft as the evening before. They had breakfast about 7 o'clock and after breakfast tried the pumps and then first found her leaking. There was not a great deal of water in her but it was coming in faster than it could be pumped out. He saw the leak in the seams of the centre board well (*Hankins*, pp. 48, 49, fol. 75; p. 61, fol. 96; *Stevens*, pp. 264, 265; *Thompson*, p. 268, fol. 472). By the almanac the tide was low Sunday morning about or a little before 9 o'clock (p. 460, fol. 833). When they began to pump and discovered the leak therefore it was within about an hour of low tide. The tide there rises and falls about 3 to 3½ feet, which is about 3 inches to the hour.

From the time the leak was discovered she gradually filled with water, settled down and in settling down her bottom for about 40 feet in length and over 20 feet in width amidships was broken and shoved up and that shoved up her decks, and the mainmast, about three feet, and her bow and stern fell till they came to their bearings on the bottom. This alone would seem to be conclusive proof that at a depth of not exceeding twelve feet below water at low tide under the centre of the vessel there was an obstruction high and large enough to break in the bottom under the strain of the weight of the vessel and the two-thirds of a cargo she had on board.

But further proof of the existence of the obstruction was afforded by the testimony of a diver who was sent down after the vessel was removed and who testifies to examining the bottom and finding a long ridge of natural rock corresponding to the break in the bottom of the vessel, and about five feet high. And while the diver was at work the master in conjunction with him and an assistant measured the

depth from the surface of the water at high tide to the highest point of the rock, and found the depth to be between thirteen and fourteen feet (*Pierson*, pp. 89 to 92; *Harp*, pp. 103, 104; *Hankins*, p. 74, fols. 116-117).

To meet this evidence the appellants some months afterwards sent down other divers, who reported and testified that they could not find any such rock; subsequently the appellees sent down divers again, who testified that they found the rock, but broken, and apparently exploded on the top, and reduced in height from about five feet to about three feet (*Wanser*, p. 395, fol. 710; *Patry*, p. 408, fol. 705; *Broom*, pp. 471-474; *Pierson*, pp. 475-476; *Olson*, 476-479; *Broom*, pp. 504-508; *Atlee*, p. 522-527; *Hagner*, pp. 563, 564).

It seems to be of little importance whether the rock was five feet high or three feet high. It would be equally dangerous at either height. The estimates of the divers as to height were necessarily only approximate.

But there is still other evidence that the bottom of the vessel was broken in by some such obstruction. A photograph of the vessel was taken in January, 1894, where she was taken out on the marine railway at Alexandria. The indentation is still very obvious, showing the nature and position of the force applied to her bottom (photo. opp. p. 149).

There is also the testimony of the three surveyors, who examined her as she lay sunk, and one of them afterwards on the ways at Alexandria, and of the ship carpenters who rebuilt her, all of whom described the injuries and gave their opinion as to the manner in which the injury was effected (*Agnew* pp. 164-172; *Davey*, pp. 181-184; *Gokey*, pp. 131-135; *Kensel*, pp. 125-131; *Berry*, pp. 258-261; *Fox*, pp. 534-542; *S. W. Smith*, pp. 551-559).

There seems to have been abundant proof, therefore, that in the berth, where she lay receiving her

cargo, there was a natural rock protruding above the level of the adjoining bottom, on which she grounded at or near low tide, and that she was wrecked by sinking on this obstruction.

After all the evidence was taken before a commissioner, the appellants got leave to introduce in evidence a government map or chart of soundings, dated in 1884, purporting to be taken at distances of five feet each way and covering this berth (*Averill*, pp. 578-584; Exhib., p. 584). Satisfactory proof, however was not made of the actual soundings represented on the paper, and even with such proof, and assuming that the map does not distinctly show the rock described by the divers, the proper conclusion would be that the map was defective and erroneous, weighed against the great mass of evidence in support of the appellees' contention in this case that there was such a rock; the proof by *Averill* and the map did show a rocky bottom with many and sudden inequalities making a very unsafe berth for vessels.

There is also proof that at a very low tide in the winter before the *Tobin* sunk there, another vessel of about the same size, grounded at the same place, and her keel about amidships was bruised and broken. She was held as on a pivot about amidships. She was being loaded under the same chute in the same berth (*Cole*, pp. 270-284).

There is also evidence hereinafter more fully stated tending strongly to show that both Chas. G. Smith, Jr., and his foreman, Speaker, were well aware of the existence of some serious obstruction in that berth (*infra*, Point V., pp. 22, 23, 38).

III.—*The wreck of the vessel was caused by this rock.*

IV.—*The vessel was staunch, strong and seaworthy.*

These two questions of fact may well be considered together, because while the existence of the

rock or obstruction in the dock sufficiently accounts for the destruction of the vessel, yet the alternative contended for by the appellants on the trial was that the vessel was old, weak, leaking and unseaworthy, and that this was the cause of the wreck.

The evidence that the vessel was staunch, strong and seaworthy and fit for the service which she undertook, is conclusively shown by several independent lines of proof. She was built in 1874, and was consequently 19 years old, but she had been always kept in good condition by her owners. She had never been a leaky vessel. Her timbers were larger than are ordinarily placed in a vessel of her size (*Burnett*, p. 185, fol. 320; *Endicott*, p. 210, fols. 363, 364).

These two witnesses had been familiar with her from the beginning. She had just delivered without injury a cargo of 3,200 barrels of cement at Fort Washington, on a voyage from New York. There was no leakage during that voyage (*Hankins*, p. 44, fol. 68; p. 56, fol. 87; *Stevens*, p. 262, fols. 460-462; *Thompson*, p. 267, fol. 469).

Captain Hankins had run her as master for nine years (p. 56, fol. 86). He testified positively to her being in good condition, not leaking and staunch and seaworthy (do. do.).

*Twiford*, who was mate on her from June, 1893, till she was wrecked, testifies to the same effect (p. 136, fols. 228, 229, 230). He gives the number of barrels of cement 3,200 (p. 137, fol. 230; p. 142, fols. 239, 240; p. 146, fol. 247).

As shown herein (*supra*, p. 14), she did not leak Saturday night, although it is probable that she touched on the rock at the low tide of Saturday evening. Many persons experienced in the examination of vessels, shipowners, ship carpenters, &c., examined her, both while she was sunk and after she had been raised and taken to the shipyard at Alexandria. They all concurred in stating that she was a remarkably strong, sound vessel, with nothing about her to make her leak except the injury

received to her bottom when sunk at the appellants' wharf (*Agnew*, pp. 164, 165, fols. 181, 182; p. 166, fols. 283, 284; p. 167, fols. 285, 286; p. 168, fols. 287, 288).

*Mr. Agnew*, who was one of the three persons who joined in the official survey, expressed the opinion that she would have gone to pieces on encountering the obstruction in the berth at Georgetown if she had not been so strong a vessel; that she was very strongly built (p. 168, fol. 287); that the nature of the injury showed that she rested upon an obstruction or rock as upon a pivot and this caused her being crushed through as she was (p. 170, fol. 291); that vessels twenty five or thirty years old, if kept in good condition, may be perfectly sound (p. 171, fols. 292, 293).

*Kensel*, another of the surveyors, a man of great experience in such matters and who had known her ever since she was built, and saw her during the summer the year before the disaster, took part in the survey while she was lying sunk at the dock, and saw her also there in August, testified that she had been well kept up, describes her condition as sunk at the dock, and had known of her being out of the water at Jersey City to be overhauled half a dozen times (pp. 125 to 131). He states that as she lay at the wharf when the tide was out her upper deck was out of the water, but when the tide came in her upper deck would have water on it (p. 130, fol. 218).

*William Gokey*, the third surveyor, was also called as a witness. He testified that he had repaired the schooner for the last ten or twelve years, with the exception of once or twice; that she was a sound, staunch vessel when he put her off of his dock two years before; that ever since he had known her she had been well kept up, twelve or fourteen years. He describes her condition at the time of the survey and described the bursting up of her decks amidships (pp. 131 to 135).

These three surveyors unite in pronouncing her a

total wreck as she lay sunk, not worth taking as a gift. Mr. Gokey thought that it would be worth \$1,000 to take her in the condition in which she was. Their judgment is confirmed by the fact that upon the sale of the wreck, which was well advertised, the only bid for her was that of Captain Endicott, for \$25, except that one bidder for \$30 failed to complete his purchase, and she was put up again and was knocked down for \$25 (*Darr*, pp. 252, 253; *Agnew*, p. 256, fol. 450).

The subsequent history of the vessel also shows that the judgment of the surveyors was right. She was purchased from Mr. Endicott, who bought her for the owners, for \$100, by John B. Lord, who gave a bond in \$5,000 to secure her removal from navigable waters. He traded her off to the Marine Ship Railway and Coal Company of Alexandria, upon terms which made the price paid for her about \$1,000. They traded her off to one Curtis, who rebuilt her. He changed her from a centreboard vessel to a keel vessel, the difference in expense being about \$1,000 in favor of the keel vessel, and she has cost \$11,000, including her sails, rigging and paint. It cost \$1,200 to get the stone out of her before she could be sold (*Lord*, pp. 149-151, 154, fol. 263; *Agnew*, p. 165, fol. 282; *Curtis*, pp. 531, 532, fol. 955).

The surveyor and agent of the American Shipmasters' Association, under whose inspection she was rebuilt for Curtis, testified that she was a very strongly built vessel; that the timbers were larger than he had ever seen in a vessel of her tonnage; that there was nothing in her condition to indicate that she was a leaky vessel, apart from the injury caused by the obstruction on which she sunk (*Fox*, pp. 534 to 539). *Berry*, the ship-carpenter who rebuilt her for Curtis, under the inspection of *Fox*, testified that her planking was sound (p. 259, fol. 455), and when recalled as a witness on behalf of the appellants after he had made the repairs, testified that she was a good vessel - timbers, planking,

bottoms and everything, sound—keel, sound as a dollar; that there was some rotten wood above deck, a little round the rail, and such as that, but that down below, her timbers were very sound and the planking on her was very sound (p. 455, fol. 823).

The appellants attempted to show that she had some soft places in her seams or butts and that some spikes had corroded, attempting thus to show that she was a leaky vessel before the disaster. It was, however, shown by the evidence of the witnesses above referred to that so far as these appearances in her condition months after she was sunk and after she had been a long time first lying in the mud and afterwards drying on the marine railway, had any semblance of truth, they did not show that there was any defect before the disaster which would cause her to leak. And the positive evidence above referred to that she was a perfectly tight vessel up to the time of the disaster, shows that the conclusions of the appellants' witnesses from such appearances were erroneous.

See also the testimony of the superintendent of the shipyard at Alexandria (*S. W. Smith*, p. 552, fols. 989, 990, 991; p. 555, fol. 994; p. 560, fol. 1001; *E. G. Lord*, p. 565, fol. 1011).

It was proven, therefore, by a great preponderance of evidence, that the disaster that happened to the vessel was caused by her grounding upon an obstruction or rock in the berth not having sufficient depth of water even in her partially loaded condition, drawing about 12 feet, and that it was not caused by any defect or want of seaworthiness in the vessel herself, which was conclusively proven to be staunch, strong, tight and seaworthy.

*V.—The appellants had knowledge or notice of this obstruction in the berth and, in any event, the circumstances were such that it was negligence in them not to know of it.*

The appellants Charles G. Smith and Charles G. Smith, Junior, constituting the firm of Charles G.



Smith & Son, operate the quarries of the Potomac Stone Company. They there carried on the business of crushing stone and loading and unloading vessels and scows. Prior to August, 1893, they had been carrying on this business for over three years, shipping stone to various points, and especially under contracts with the Engineer Department of the Government at Fortress Monroe (*Smith*, pp. 291, 292). The business was a very large one. During the year 1893 alone, before the accident to the *Tobin*, they loaded from 15 to 20 vessels at the same place (p. 255, fol. 520). The capacity of the crusher for loading vessels through the chute was from 150 to 200 tons a day. Charles G. Smith, Junior, lived in the City of Washington. The firm leased about two miles and a half of river front, part quarries and part that had not yet been opened. They employed from 150 to 300 men; at times, 500 or 600. Besides the machinery for loading vessels through the chute, they had bins into which they ran the crushed stone to be carried off in other ways. Charles G. Smith, Junior, was at the wharf attending to business nearly every day (*Smith*, pp. 291, 292; p. 295, fol. 520; p. 303, fol. 535; p. 304, fols. 537, 538; p. 305, fol. 539; p. 307, fol. 543; p. 309, fol. 547; p. 311, fol. 550; p. 319, fol. 565).

The appellants had direct notice of this rock in December, 1892. In that month the *Francis R. Baird*, Cole, master, was at that same berth loading with stone. She was a two-masted schooner carrying 500 tons, and, when loaded, drawing 14 feet (*Cole*, p. 270, fol. 475). After loading, off and on, two or three days, and drawing 12½ feet, she grounded. When her master first noticed it she was raised out of the water about 8 inches (p. 271, fol. 477). The captain sounded with a pole. He thrust it down by the keel, and it sounded hard like a rock. He had Charles G. Smith, Jr., one of the appellants, called, and he shoved the pole down in his presence, and Smith admitted it sounded like rock (p. 273, fol. 480). Then Smith proposed hauling her off with a

tug. They hauled on her bow and pulled it a little, and her stern swung the other way. Smith proposed hauling on her stern. They tried it, and hauled her stern, and the bow went the other way. She went round as if on a pivot (pp. 273, 274, fol. 481). There was a heavy westerly wind, and the water kept falling so that she was finally three feet out of water drawing only nine feet as she lay aground (p. 274, fol. 481). When the wind went down and the tide returned she floated and they hauled her further out (p. 279, fol. 490). They afterwards put in another scow to put on more cargo (p. 279, fol. 491; p. 280, fol. 492; p. 282, fol. 496). The injury done to the vessel then visible was that some of her deck beams were broken, and while on the rock she was bulged up, but she did not leak (p. 274, fol. 482). When taken out of the water it appeared that an eight-inch shoe was jammed off for 20 or 30 feet and the keel was damaged (p. 280, fol. 492). Smith went below and examined the beams (p. 275, fol. 483). Her master had some controversy with Smith about damages, but was glad to get away as he was liable to be kept in the ice all winter—and accepted from Smith payment of part of the cost of towing him below the ice (p. 275, fol. 483; p. 277, fols. 486, 487).

This affair of the *Baird* was direct notice to Smith and the foreman that there was a dangerous rock in the berth. Smith does not, in his testimony, deny the conversations testified to by Capt. Cole about sounding and hitting the rock under her, or the hauling on her with the tug. He admits going down to look at her beams.

There are other circumstances strongly indicating that both the foreman and Smith knew there was something in that berth making it unsafe for a vessel like the *Tobin*, drawing 14 feet, to complete her loading there. It is proved that while small vessels completed their loading there, vessels like the *Tobin* were breasted further off by putting a second scow between them and the wharf and putting

the last part of the cargo on by wheeling it in wheelbarrows across the two scows. This they certainly would not have done if it had not been necessary, for it prevented the use of the wharf in unloading stone for the crusher, and by Smith's own statement it cost them about 20 cents a ton more to load that way (*Smith*, pp. 306, 307, fols. 541, 542; p. 309, fol. 548; p. 310, fols. 548, 549). Smith also says that he told the captain that he finished loading the *Sunlight* in that way (p. 313, fol. 555), and that he told the foreman on Saturday morning that if the captain wanted a pole to shove him off or another scow, to give him that (p. 313, fol. 554). In a memorandum prepared by Smith for his counsel about the time of the injury to the *Tobin*, which purports to state not only facts within his own knowledge, but facts derived from other sources, and which was introduced against appellees' objection (pp. 331, 332, fols. 589, 590), he says: "Several men were pumping vessel during Sunday morning, and it does not appear that the vessel sunk *on the rock* until she had made some water" (p. 468, fol. 846). This is a plain admission that he then, immediately after she sunk and long before there was any examination by divers or otherwise under the vessel, knew that it was a *rock* on which she had been wrecked in the berth.

That statement also refers to the case of the *Sunlight* being partly loaded breasted out with two scows, and shows an evident expectation that the further loading of the *Tobin* would be done in the same way. The pretense which appears in the statement and also throughout the testimony, that this shoving out of vessels like the *Sunlight* and the *Tobin* was because the captains wished it and not because it was a necessary precaution on account of insufficient depth of water, is very absurd.

In view of this admission in the statement and the direct notice of the case of the *Baird*, Smith's testimony that he had "no notice from any one," and "no knowledge of any rock or obstruction that would

damage a vessel," is unworthy of belief. It certainly discredits him as a witness (pp. 302, 303, fol. 534).

Charles G. Smith, Senior, whose knowledge of the condition of his own premises is equally to be presumed, and whose want of knowledge it was equally important for appellants to show, was not called. The case of the appellants on this point is not improved, but rather damaged by the fact that they had the dock dredged out in the spring of 1893, after the *Baird* was injured and before the *Tobin* was wrecked.

*Somers*, the dredger, who testifies to making the bargain for dredging with Smith, Jr., testified that there was no depth specified as the depth to be dredged; that he was to take out the mud and the broken stone; that he found the bottom rocky and in many places the bucket jumped and slipped over something too large to be raised in that way; that he could not tell if it was a natural rock or boulder; that he complained to Smith, Jr., that the work was not what he understood when he made the bargain; that he brought up some pretty large stones—one 2 or 3 feet thick and roundish; that he appealed to Smith, Jr., for an increase of pay on account of these difficulties, but Smith refused (*Somers*, pp. 240-252). It seems incredible under these circumstances that Smith believed that there was a uniform depth of 14 to 15 feet, as he states he understood from the dredger.

Upon the whole evidence bearing on this point, the conclusion of the Court of Appeals, as stated in his opinion, by Chief Justice Alvery, is well sustained as follows (p. 698): "But it would be difficult to conclude, upon the evidence in this record, that the appellants did not have knowledge of the existence of the rock and of its dangerous nature. They had been for some years in the use of the wharf and of this particular berth; and it appears that not a great while before the occurrence of the accident in ques-

tion, a vessel, while being loaded with stone from the same wharf, and occupying a berth in front of it, struck upon a rock and was injured, and this fact was brought distinctly to the knowledge of the appellants."

*VI.—The master was not guilty of negligence which contributed to the injury.*

1. The first specification of negligence in the answer (p. 18, fol. 29) is in not ascertaining the condition of the bottom of said berth or dock.

Assuming that there was an obligation on the master to take any precaution of this kind on entering a dock at the request or upon the business of an owner of the wharf, the master in this case did far more than could reasonably be required of him. As before stated, the contract or charter for the taking on board of this cargo was made, not with the appellants themselves personally, but with Lee. He was a ship chandler, having a store looking out upon this wharf and dock, and had been in the habit, long before the *Tobin* came, of engaging vessels for the appellants for this business (*Lee*, p. 80, fol. 127; p. 82, fol. 130). The captain testifies that on Tuesday, he having had some previous conversations with Lee, went to Georgetown and told him he would take the stone (p. 45, fol. 69). He testified:

"I asked him how much water there was, and if  
 "there was enough to load us through, and he asked  
 "me how much I drew. I told him that with 570  
 "to 575 tons of coal, our usual load, we drew from  
 "14 feet to 14 feet 3 inches, and with stone I should  
 "put in 600 tons and draw 14½ feet. He told me  
 "there was plenty of water. He said: 'You can load  
 "with 15 feet.'" He said: 'Mr. Smith had had  
 "it dug out this last spring to make 14 or 15 feet at  
 "low water.' He said: 'You can load there at 14  
 "feet with low water.'"

Objection was made to the declarations of Mr. Lee, on the ground that he had no authority to bind the appellants, but on the question of the diligence of the master in respect to this particular point, the evidence was certainly competent and important as showing the master's diligence. It is true that Smith, in his testimony, has denied any authority for Mr. Lee to act for him, but it is equally true that for many months, if not for years, Mr. Lee had engaged vessels which loaded at the pier, and the arrangements made by him for such freighting business, including the amount of freight per ton, had been acted upon and ratified by the appellants. Indeed, in this particular case the vessel began to load before the master saw Mr. Smith, and when he did see him Lee introduced him as the gentleman the master was loading for (p. 46, fol. 72).

Wholly aside from the particular relation between Smith and Lee, Lee was a proper person of whom to make inquiries. From his being engaged in this business of procuring or furnishing vessels for the loading of stone at the wharf he was naturally the person of whom the master would make inquiries.

Having moored his vessel first above Smith's wharf, he went round and saw Mr. Speaker, foreman of Mr. Smith's works, on the dock (p. 46, fol. 70).

Here again the objection is made that Mr. Speaker had no authority to bind Smith by his declarations with regard to the condition of the dock. This position is clearly untenable, because Speaker was the representative of Smith, placed by him in charge of the dock, and unless he represented Smith, then Smith had nobody there to transact business for him. Smith very disingenuously seeks to limit his authority to that of a mere engineer, but in the statement introduced by him, made almost contemporaneously with this disaster, he calls him the foreman of the crusher (p. 467, fol. 844). There would seem to be no doubt of his being put in such a position in charge of his

business that his declarations were the declarations of Smith. At any rate, on the question of the diligence of the master he was the proper person, Smith not being there, for the master to make inquiry of. And the master testifies: "When Mr. Speaker came I told Mr. Speaker we would haul her so that the chute would hit the hatch as we wanted her. We did not lay in the right position for the hatch under the chute. We hauled her until he said she was right" (p. 46, fol. 71).

There was but one place for the vessel to lie, that was so that the chute would deliver the stone into the hatch of the vessel. The arrangement of the crusher was made for this very purpose.

There is a photograph (next following p. 114) showing how the chute was arranged. It was a permanent chute or channel attached to the crusher, coming out 25 feet from the edge of the wharf, so that a vessel lying outside of a barge could receive the stone into her hatch. To the foot of this permanent part of the chute, which extended 25 feet out, that is, beyond the width of the barge, a movable iron chute was attached, one end to the lower end of the permanent chute, and the other end going into the hatch. There was, therefore, little or no room for choice of position or movement of the vessel while receiving her cargo, except that she was hauled backwards and forwards to accommodate the chute to the forward or the after hatch, and her bow and stern could be slightly moved in or out.

This photograph (Exhibit No. 8) shows the edge of the wharf, the chute coming from the crusher, the intervening barge, and a vessel lying outside in position to receive her cargo. It appears by other evidence that the hatch over which the chute was first placed was the after hatch, and she continued to receive stone there till sometime Friday between 2 and 3 o'clock. The master then continues:

"I then asked him (Speaker) how much water there was there. He said it had been dredged



“ out to between 14 and 15 feet this spring, and he  
 “ showed me piling there. He said, ‘ We didn’t  
 “ dredge below that piling.’ It was the fourth  
 “ piling from the stone crusher down the river, but  
 “ he told me the water was deeper below there, so  
 “ that it didn’t need digging out, and there was  
 “ water enough, just so we breasted our stern off so  
 “ that the bilge would not touch where the lighters  
 “ were unloading stone. He said there might have  
 “ been some small stone falling off the lighters. He  
 “ didn’t know there had been any, but there might  
 “ be some dropped off ” (p. 46, fol. 71).

As to the position of the vessel being determined by the appellants, it is admitted by Mr. Speaker, who says:

“ Q. What, if any, directions did you give to the  
 “ captain as to where to go or what he could do  
 “ with the schooner on her arrival?

“ A. I told him where to take his berth and asked  
 “ him which hatch he wanted us to commence dis-  
 “ charging stone into, and he told me, and then I  
 “ showed him what position to put the vessel in so  
 “ that the chute would discharge into the hatch that  
 “ he designated ” (p. 334, fol. 594).

Mr. Speaker denied having any conversation with the captain at that time or before Friday afternoon, with regard to the depth of water, but Twiford, the mate, corroborates the captain. He says that he heard the conversation between the captain and a gentleman on the wharf. He asked the gentleman how much water there was there and he told him there was 15 feet of water. He didn’t know the person at the time, but afterwards he knew him as Mr. Speaker, the superintendent of the wharf (p. 138, fol. 232). He was also corroborated by one Godfrey, an assistant engineer and employee of the Smiths, who helped to moor the vessel. He testified:

" Q. Did you hear any conversation take place at that time between the foreman of the wharf, Mr. Speaker, and any one?

" A. I heard the captain asking about the water.

" Q. What did he ask him?

" A. He asked him how much water was there, and he said ' plenty of water.' Then he asked him what did he call ' plenty.'

" Q. What did he say then?

" A. He said 15 feet."

" Q. Did you hear Mr. Speaker ask the captain anything?

" A. No more than ask what the vessel drew.

" Q. What did he say?

" A. 14 feet " (p. 119, fols. 197, 198).

Against all this testimony in confirmation of the captain's account, the denial of Mr. Speaker should properly be and probably was by the Court below, attributed to a failure of memory.

The captain then testifies:

" We had a pole to breast her off with from the dock, so the vessel could not sag in on the lighter, so they could work the lighter to hoist the stone up on the crusher and crush it and let it come down the chute on board the vessel. After we got the pole in place I took the lead and threw it over aft, over the quarter, I didn't find less than 13 feet up to the mizzen rigging, and after we got to the mizzen rigging and abreast of where Mr. Speaker stood, it dropped off to about 16 feet. They went to work as soon as they got ready Thursday morning after we got in place dumping stone in the aft-hatch " (p. 46, fol. 71).

If the captain had done nothing more and nothing more had been said to him on the subject of the depth of water, this would have been abundant diligence on his part, but the next day, Friday, in the forenoon, he called at Mr. Lee's office and saw Mr. Lee and Mr. Smith, Junior, and there he was first introduced by Mr. Lee to Mr. Smith as the person

he was loading for, and the captain testifies that after some conversation about the length of time it would take to load, "I asked him how much water " he had there. He said that he had had it dredged " out this spring, in April, and that they were to " make 14 or 15 feet and there were 14 feet sure at " low water" (p. 46, fol. 72).

He testified that Mr. Smith told him he would like him to make some soundings for himself. He said there might have something dropped over from the lighter he didn't know of, but would like him to sound (p. 47, fol. 72).

On cross-examination, referring to this conversation with Mr. Smith, the captain testified:

" Q. Then what did you say?

" A. I asked him how much water there was at " the dock.

" Q. You had been lying then for nearly two " days there?

" A. One and a-half nearly.

" Q. And he told you he would like you to sound " for yourself?

" A. He said he would like me to make some " soundings for myself.

" Q. That was what time of the day?

" A. I think it was a little before noon. I should " judge about 11 o'clock.

" Q. What did you say in reply to that advice of " his?

" A. I told him I would.

" Q. And did you do it?

" A. I did.

" Q. Immediately?

" A. No, sir, not immediately.

" Q. When?

" A. I did that afternoon" (pp. 64, 65, fol. 101).

Later the witness makes a fuller statement of this conversation as follows:

" After I had an introduction to Mr. Smith and " he told me how much water there was—that there

" was 14 feet sure at low water—he told me  
 " he would like me to make some soundings  
 " around for myself, and he said he would  
 " have his men help my men shove off with a pole  
 " that he had on the lighter whenever we wanted  
 " to shove off, and he wanted me to sound  
 " on the inside, as some stone might have  
 " gotten off the lighter, and if we shoved her bilge  
 " off—her side he called it—so we didn't hit the  
 " stones, there was nothing to hurt us, and when he  
 " came on the dock that afternoon he told me the  
 " same thing" (p. 77, fol. 122).

Mr. Smith's account of this conversation was as follows:

" Mr. Lee introduced me to the captain, and said  
 " to the captain that I was the party who was load-  
 " ing the vessel. The captain made some remark  
 " as to when we would be apt to finish the loading,  
 " and I think I said on Monday or Tuesday; that we  
 " loaded in the neighborhood of 125 to 150 tons a day.  
 " There was some other little conversation as to his  
 " wanting to get away as soon as he could, and I told  
 " him that we wanted him to get away as soon as  
 " we could load him. He then asked something as  
 " to the amount of depth of water in front of the  
 " wharf. I think he asked what the depth of water  
 " was in front of the wharf. Mr. Lee answered the  
 " question; I don't know whether the captain asked  
 " me or asked Mr. Lee, but Mr. Lee answered him  
 " by saying that it had been dredged out in the  
 " spring to the supposed depth of 14 feet. The cap-  
 " tain had some conversation with Mr. Lee, I think  
 " as to about what water he drew, and he also said  
 " that it would not hurt him to lay on the bottom  
 " if the bottom was in decent shape. I told him I  
 " did not know just what the bottom was, but that  
 " I would advise him to make his soundings there  
 " and to find out from time to time just how his  
 " vessel was laying, and that I would see that he  
 " had any assistance he wished in moving the ves-

(a.) This expression, that he did not know just what the bottom was, is denied by the Master (fol. 917), and not confirmed by Lee (fols. 129, 139). According to the sworn answer, if used, it was coupled with the expression "although they thought it was all right" (fol. 27), and in the statement made by Smith it was coupled with the same expression, and with the advice to sound *around* the vessel (fol. 844).

“sel forward or aft or shoving her out; that we  
 “would do just what he wanted done, and that  
 “after he made his soundings he could tell me what  
 “he wanted done. I told him that we had loaded  
 “vessels as large as his vessel and mentioned one  
 “or two that were larger where I had told the cap-  
 “tain, as it has been my invariable custom to do, to  
 “make their soundings as they loaded. I referred  
 “especially to the *Sunlight*, and stated that we had  
 “loaded her, and I believed that she was a larger  
 “vessel than the *Tobin*; that we had put in the last  
 “hundred tons or so by putting in two scows, and  
 “wheeling on board across the scows—wheeling  
 “from the bins with wheelbarrows. I told him we  
 “would do that or anything else that he wanted if  
 “he would indicate what he wanted. That is about  
 “the extent I think of our conversation.

“Q. What, if any, reply did he make?

“A. He said that he would sound. He assented  
 and seemed to understand ” (p. 293, fols. 515-517).

In the answer sworn to by Mr. Charles G. Smith,  
 Junior, there is some recital of this conversation,  
 as follows:

“ On Friday, the 4th day of August, 1893, the  
 “said schooner being then partly loaded, one of  
 “these respondents, Charles G. Smith, Junior, said  
 “to the said master that it would be wise  
 “for him to sound around his vessel and make sure  
 “that she was lying all right; that it was usual for  
 “captains to look out for their own vessels and  
 “their position at the wharf, and that although the  
 “said berth or dock had been dredged out in the  
 “early part of that year the respondents did not  
 “know just what the bottom was, although they  
 “thought it was all right; that he would advise  
 “the master to sound and satisfy himself as to  
 “the depth of water and that respondents would  
 “give directions to their men to carry out any in-  
 “structions the said master might give as to loading,  
 “&c., and that they would aid the said master in

“ shifting the position of said schooner if he considered any change necessary ” (pp. 17, 18, fol. 27). And in the statement made by Smith to his counsel immediately after the wrecking of the *Tobin*, he says:

“ On Friday, when the *Tobin* was partly loaded, I had conversation with the captain in Lee’s store, and in the presence of Joseph H. Lee, who heard the conversation. In this interview I stated to the captain that it would be wise to sound around his vessel and make sure that she was laying all right. The captain said it would not hurt to lay on the bottom slightly and referred to the *Sunlight*, a larger vessel than his, having loaded there last year. I said in reply to this that it was usual for the captains to look out for their vessels and that while the dock had been dredged out since the vessel *Sunlight* had loaded, at the same time I did not know just what the bottom was, but thought it all right, but would advise him to sound and I would tell the foreman to carry out any instructions that he, the captain, might give as to loading or not loading, and that he would, if necessary, help him shift. I also stated that we finished loading the *Sunlight* with wheelbarrows instead of running direct from the chute ” (p. 467, fol. 844).

From this averment in the answer and also in this statement made after the disaster, it seems entirely certain that what Mr. Smith advised the captain to do was to sound *around* the vessel as she lay at that time, to Smith’s knowledge, receiving her cargo. That was the only precaution which Smith advised him to take.

Mr. Lee’s account is as follows:

“ Then, on August 3d, the captain was in my office, and Mr. Smith came in there and I introduced him to Mr. Smith. I said, ‘ Captain, this is your shipper and you will have to make your



"complaints to him.' The captain said, 'How about the water there?' Well, I presume I ought to have allowed Mr. Smith to answer the question, but I answered it for him, and I said, 'The dock had been dredged out, supposed to be 14 feet, though you might touch at low water.' Mr. Smith said to him, 'I want you to make some soundings for yourself, and our superintendent will help you to place the vessel'" (p. 81, fol. 129).

He also testified that before this introduction, when he saw the captain before that day the captain asked about the depth of the water (p. 82, fol. 131; p. 83, fol. 132).

Lee understood that the *Tobin* was a 14-foot vessel--drawing about 14 feet (p. 84, fol. 133).

Lee restates the conversation as follows:

"I introduced Captain Hankins to Mr. Smith.  
 " \* \* \* I said to the captain: 'This is your  
 " shipper."

" (Q. Had the captain asked any questions just before that? A. No, sir—) 'To him you will make your complaints'. The captain replied, 'I don't think I will have any to make'. He then asked as to the water.

" Q. The captain did?

" A. Yes, and I replied, 'The dock had recently been dredged out, supposed to 14 feet at low water, though your vessel might ground at low tide.'

" Q. Did you then say, 'But nothing to hurt.'

" A. I don't remember that. Then Mr. Smith and Captain Hankins had a conversation, but I paid no attention to it" (pp. 87, 88, fol. 139).

It is quite clear from these conversations, even as stated by Mr. Lee and Mr. Smith, that they were intended to give the captain the impression that the only precaution he need take was to sound *around* his vessel. Nothing was said about any obstruction or rock in the berth itself, or under the vessel. The

conversations as stated by Smith and Lee would not lead any one to suppose that any other precaution was necessary. It amounted to a statement that that berth where the vessel lay had been dredged out to 14 feet, or about that.

The captain, that afternoon, following the advice given him by Mr. Smith, made careful soundings around the vessel. He took the precaution to mention to the mate what Mr. Smith had told him about the water and about the soundings, and instructed him if he hauled—that is hauled his vessel—so as to load at the forward hatch while he, the captain, was absent, to be sure to sound and find the depth of water. He testified that he went up to Mr. Lee's store after dinner and came down about 3 o'clock. The mate had just hauled her—just got her fast. He asked the mate if he had sounded, and he told him he had and that he found 13 feet of water. The captain then testified:

“ I took the lead line and marked it off and went  
 “ on board. I marked it off in feet and tied rope  
 “ yarn around the lead line, measured with my rule  
 “ one foot apart, and then took the lead and  
 “ sounded for myself. I commenced aft and  
 “ sounded up to the mizzen rigging. The least I  
 “ found was 13 feet and 2 or 3 inches, and after  
 “ I got by the mizzen, that piling where Mr. Speaker  
 “ told me it was dug out to, it deepened off to 16  
 “ or 17 feet. I did not measure exactly, because  
 “ there was plenty of water. The mark went down.  
 “ That was Friday afternoon ” (p. 47, fols. 72, 73.)

At the time of these soundings the vessel was of course by the stern. Up to 2 o'clock they had been loading in the after hatch, and at the time of these soundings they had just commenced loading into the forward hatch. The fact that the master didn't sound forward of the piling referred to as the fourth piling, where he found 16 feet of water, is to be taken in connection with the statement which had been made to him by Speaker when the vessel was

(a.) Counsel for appellants argue that if the master's report of soundings on Friday afternoon be reduced by an allowance for the height of the tide at that time above low water, the master ascertained that there were less than 14 feet in the berth, at one point  $11\frac{1}{2}$  feet only, and at other points 12 or  $12\frac{1}{2}$  feet at low tide, and therefore the master then discovered that the supposed representation of 14 feet was not true, and that the vessel was liable to touch at low tide and the master voluntarily took the risk (Fifth Point, pp. 38 to 40).

It nowhere appears that the soundings given were not low water soundings. They are substantially the same as Saturday's soundings which certainly were so. Nothing to the contrary appears in the captain's testimony, nor was he cross-examined on that point. Where he found shoal water was where Mr. Smith and Mr. Speaker had both told him the water might be shoal in consequence of stones falling off the scows, outside of the after part of the vessel toward the wharf. This would not affect in any way the safety of the vessel, because from the shape of the hull and bottom the vessel could not touch at that point. Even, therefore, if a correction were made for the tide, there was, as the captain said, plenty of water, or water enough. But Speaker reports deeper water than the Captain (fol. 608). These given by Speaker may be the depths actually found. He says that the Captain said it was all right (fol. 596). The condition of the wreck after she sunk on this rock and in

this berth shows that the master was right in his conclusion that there was water enough, and more than enough where he sounded, and everywhere, except at the centre of the berth, where this rock was, for lying in the same place she was pushed up amidships some 3 feet, yet both the stern and the bow were sunk in their places to the bottom, bringing the draft marks of  $13\frac{1}{2}$  feet forward and  $14\frac{1}{2}$  feet aft under water, with the water coming up on the upper deck at high water (Kensel, fol. 218; Hankins, fol. 96). The soundings of Friday, therefore, did not give the master any notice whatever that the vessel was in danger of touching at low water. And if Speaker and Smith are right that putting on the last of the cargo by wheelbarrows had been already talked about, the vessel needed not fourteen but about twelve feet.

This argument is an entire shifting of the issue, and inconsistent with the answer. The charge of negligence is that the master *did not ascertain* the condition of the bottom of the berth or dock. By an afterthought, apparently suggested by a slight obscurity in the testimony as to the soundings on Friday, they now urge, *upon the appeal*, that the captain *did ascertain* the danger and voluntarily encountered it. (See also 5th Error assigned, Appellants' Brief, p. 28).

The real and only danger was the rock in the centre of the berth. This certainly was not discovered or suggested by Friday's soundings.

first placed in the berth, and which is not denied by Speaker as a witness. He had then told the captain that from that piling down they had not dredged, and that the water was deeper there and needed no dredging. There was water enough (p. 46, fol. 71). Speaker and the mate confirm the captain's testimony as to his soundings on Friday afternoon (*Speaker*, p. 335, fol. 596; p. 341, fol. 607, 608; pp. 376, 377; *Twiford*, pp. 140, 141.) (a)

The subsequent soundings made by the captain on Saturday, after he thought the vessel touched, confirms this statement of Speaker, which indeed was repeated to the captain on Saturday afternoon by him (p. 47, fol. 73).

These soundings on Saturday were all around the vessel.

He didn't find less than 12 feet anywhere on the inside nor less than  $14\frac{1}{2}$  feet on the off-shore side, and right over the stern there were  $13\frac{1}{2}$  feet of water (p. 48, fol. 74).

The shallowest sounding was taken from the lighter, six feet at least inside of the schooner (p. 513).

At half-past 2 on Friday—that was soon after they commenced with the forward hatch—she drew 13 feet aft and  $8\frac{1}{2}$  forward (p. 60, fol. 94).

The longer they worked the forward hatch the more, of course, she came up at the stern.

These soundings on Saturday were at about dead low water, after quitting work (p. 62, fol. 97).

Therefore, even assuming that Smith and Lee are more correct in their statement of the conversation with the captain on Friday morning than the master, he did all that he was advised or warned to do, and upon their own statements they said nothing to him about the bottom being a rock bottom; they said nothing to him about the case of the *Baird*, except that she touched at a very low tide, although it was known to them that she got on some obstruction in this berth, resting on her keel about amidships, as on a pivot; they said nothing about the

rock which Smith, in his statement made to his counsel, admitted was there, and which he knew was there from the way the *Baird* acted; they said nothing about sounding otherwise than *around* the vessel. There was nothing in what they said to lead the captain to suppose that there was any danger provided he found water enough *around* the vessel.\* Neither he nor the vessel had ever been in Georgetown before (p. 79, fol. 124).

There was, therefore, an entire failure to prove any want of diligence in this respect on the part of the master. But that the defendants were themselves aware that there was a danger in the middle of the berth is distinctly admitted in the cross-libel, for they say:

“ While said schooner was lying at said wharf and  
 “ while taking on said cargo,” &c., “ said schooner  
 “ began to leak, and in consequence of the negli-  
 “ gence, carelessness and want of skill on the part  
 “ of said master in not removing the water there-  
 “ from and in not placing the said schooner in a  
 “ place of safety, and by reason of the negligence of  
 “ the said master in failing to take proper measures  
 “ to ascertain the condition of the bottom of said  
 “ berth or dock at said wharf, and *to avoid the dan-*  
 “ *ger of injury that the said master would have dis-*  
 “ *covered if he had made proper soundings and*  
 “ *examination of the said berth and dock, and the*  
 “ *bottom thereof*, the said schooner on the 6th day  
 “ of August, 1893, sank at said wharf at her said  
 “ berth and in said dock” (p. 21, fol. 32). The  
 italics are ours.

It is true that this specification contains an averment that the vessel had begun to leak at the time the master was negligent in not ascertaining the condition of the bottom of the berth or dock, but that averment has been distinctly disproved, and here is a statement in the cross-libel, sworn to by Charles G. Smith, Junior, on December 26, 1893, that if the master had taken proper measures to

ascertain the condition of the bottom of the dock, if he had made proper soundings and examination of said berth, he would have discovered the danger of injury. The only danger of injury which has been shown was the existence of this rock in the middle of the berth under the vessel.

The appellants, as shown by this averment in their cross-libel, knew of the danger, at any rate, December 26, 1893, and they say that the master would have discovered it if he had sounded under the vessel, but they did not advise him to do that. They have not shown that they themselves made any discovery of this danger between the 2d of August and the 26th of December.

2. The next specification of negligence is that the master did not shove said schooner further away from said wharf into deeper water when advised to do so, and did not place an additional scow between said schooner and the wharf, as urged to do, said scow being provided for that purpose by the respondents (p. 18, fol. 29).

This specification assumes that the master was advised to shove the schooner out and failed to do so and was urged to put another scow between the schooner and the wharf and failed to do so.

The evidence does not sustain the claim on the part of the appellants that he neglected any such advice or disregarded any such urging. The reference here is to the transactions at the close of the day on Saturday which have been already referred to. There is a conflict in the evidence as to what took place between the master and Mr. Speaker, the appellants' foreman.

The statement of the master is that on Saturday about 3 or 4 o'clock she was breasted off a little aft with the consent of Mr. Speaker in order that they could get ready to clear the decks off when they knocked off work; that at about 5 o'clock he noticed that the schooner was tipping to the head, and that he asked Mr. Speaker if she was not on



something. He, the captain, thought she was tipping too much, but Speaker said, No, that she was on nothing. He said, "Forward of the piling, that fourth piling, where it had been dug-out, you would not touch her if you are full loaded on the lowest tides, just so you breast her off aft. So she don't come in aft there is nothing to hurt you. He said to me that he was going to knock off at 5 o'clock, that being Saturday, and she would not tip much more anyway, and Monday morning he would put another lighter inside of us. I asked him how he was going to get the stone on board aft after he put the lighter inside, and I said, 'You had better knock off work now if you are going to put a lighter in Monday morning and not put any more stone in.' He said, 'We are only going to work a few minutes now. It is nearly 5 o'clock. Monday morning we will put the lighter in.' He says, 'You are lying all right,' and I did not sound again till after they knocked off work. He worked until 15 minutes after 5 and quit. After he had quit he told me that he would be down there Monday morning to put another lighter before he commenced work again. After the men had gone up to get their pay, up to the office, it came to my mind if we waited till Monday morning I would lose something in hauling, and if he would take the chute out that was in our hatch I would put the lighter in between that time and Monday morning and not lose any time." Referring to the iron chute, "It was impossible for me to haul with that in there, and I wanted him to take that out. He said he would get some of the men to take that out. After they got their pay there was two or three men came down there and took the chute off and lowered it on our deck." The captain then made soundings (pp. 47, 48, fols. 73, 74).

Mr. Speaker's account of this affair was as follows:

He says they resumed work Saturday morning and kept it up during the day.

“ Q. During the day, what, if any, conversation  
 “ did you have with the captain about moving the  
 “ vessel out and as to her position there?

“ A. During the day we talked of moving her out  
 “ and we talked about finishing the work by wheel-  
 “ barrows. We were talking about getting along  
 “ so nicely, that we thought we could finish it on  
 “ Monday—finish his cargo. Then we talked about  
 “ getting another scow in there to lay over Sunday.”

There was then some talk about another pole  
 being obtained, as they would need two poles if she  
 was breasted off outside of the second scow (p. 336,  
 fol. 598).

“ I stopped loading on Saturday about 15 or 20  
 “ minutes of 5 o'clock ” (p. 337, fol. 601).

“ Q. State how you came to stop and the con-  
 “ versation you had with the captain.

“ A. The captain came on to the wharf and I  
 “ was out there. I believe he was out on the wharf  
 “ when I went out on the wharf. He was standing  
 “ at the bow of the vessel—standing forward there  
 “ under the hoister. The captain says to me, he  
 “ says, ‘ I believe I am ebbing out a little bit.’ It  
 “ was then about low tide.

“ Q. State right there what you mean by ‘ ebbing  
 “ out.’

“ A. I don't know what he meant by ebbing out,  
 “ that we were discharging stone in there and that  
 “ he was not going down any more. I suppose  
 “ that is what he meant by ebbing out. I told him  
 “ that if that was the case we would stop work.  
 “ He said that he didn't want to get her down by  
 “ the head because he was making a little water,  
 “ and he didn't want to get away from the pumps.  
 “ He said that if we continued on he believed she  
 “ was ebbing out, that if we continued to discharge  
 “ stone in there he would get her too far by the head  
 “ and she would make a little water and he didn't  
 “ want to get her away from the pump. I told him  
 “ in that case I would stop the machine and not put

"any more in, which I did. I gave the signal for  
 "them to stop the machine and the machine  
 "stopped. After the machine stopped, it being  
 "Saturday night, the men all took out for their  
 "money, and so, after the men got away he and I  
 "were standing on the wharf alone, and he says to  
 "me, 'What am I going to do about this iron chute  
 "up here?' He says, 'I want to haul on high water  
 "and you haven't told me what scow I shall use.' I  
 "pointed to him and I says: 'Here is the scow lying  
 "right ahead there. Take that scow lying right  
 "ahead of you. That is the most convenient.' He  
 "said he wanted to haul on high water, and I told  
 "him to use that scow. So I went out then, and to  
 "have it all straight I called some of the men—a  
 "number of them—back to take the iron chute  
 "down, and they laid it on the schooner.

"Q. Who were the men who helped to take the  
 "chute down and put it on the schooner? A. I  
 "don't know. There were some. I think, if I ain't  
 "mistaken, there were five or six of them there,  
 "but I don't know just who they were" (p. 338,  
 fol. 602).

Then, after some reference to the conversation  
 about the pole that had been brought down, he  
 testified:

"Q. Did he say what use he was going to make  
 "of the pole? A. No, sir; only what he and I  
 "talked together about using two poles the day  
 "before; that on Monday after we had taken the  
 "second scow out we would use the pole, and then  
 "let her come in as close as would admit the chute  
 "to discharge into the vessel.

"Q. State what was said about the reason for  
 "putting in another scow?

"A. He thought that he could not get a full cargo  
 "there, and I wanted him to make his soundings,  
 "although he said he found plenty of water every  
 "sounding he made there. He said there was

"plenty of water. Saturday evening, though,  
 "when he said he was ebbing out, he thought he  
 "was caught on to something (p. 339, fol. 604). \* \*

"Q. What time was it when you left the wharf  
 "on Saturday afternoon?

"A. I wouldn't say positively the time, but it was  
 "about half-past five or six (p. 340, fol. 605).

"Q. At that time, this scow of which you speak  
 "was just in front of the vessel?

"A. Yes, sir" (p. 340, fol. 606).

He then says that he next saw her at the wharf  
 between 9 and 10 Sunday morning, and that the  
 same scow was in the same place, right forward  
 (p. 340, fol. 607).

"Q. On Saturday afternoon did the captain ask  
 "you if she was not on something, and did you say  
 "that she was on nothing?"

"A. No, sir. I never made any such answer as  
 "that. On Saturday afternoon—— I don't think  
 "the captain and I had any conversation at all until  
 "the evening.

"Q. Did you say to the captain, 'You won't  
 "touch here if you are fully loaded on the lowest  
 "tide just so you breast her off. If she don't come  
 "in aft there is nothing to hurt you'?

"A. No, sir.

"Q. Did you tell the captain on Saturday after-  
 "noon, between five and half-past five o'clock, after  
 "you had quit work, that you would be down there  
 "on Monday morning to put in another lighter  
 "before you commenced work again?

"A. No, sir.

"Q. Did you tell him anything of that kind?

"A. No, sir. I told him on Saturday when  
 "we talked, and I left with the understand-  
 "ing—when I took the chute down for him  
 "and designated the scow which he could use—  
 "I left with the understanding that he was  
 "going to haul on high water and on the first high  
 "water. He didn't say the first high water, but he

“ said that he wanted to shift on high water. That  
 “ is the way he expressed it.

“ Q. He said that he wanted to shift on high  
 “ water?

“ A. That is the way he expressed it exactly, sir.  
 “ I took the chute down for him and told him which  
 “ scow to use.

“ Q. Did you tell him in anyway or give him in  
 “ anyway to understand that you were going to  
 “ shift it on Monday morning?

“ A. No, sir; I did not.

“ Q. Did you give him to understand that you  
 “ considered this vessel safe there and it was not  
 “ necessary to move her until Monday morning?

“ A. No, sir; I did not. If I had done that I  
 “ would not have made preparations to get the pole  
 “ and scow, and preparations for to put another  
 “ scow in there” (pp. 341, 342, fols. 608, 609).

Mr. Speaker, in denying the conversation with the  
 captain about the water on Thursday, says:

“ The only conversation the captain and I had  
 “ with regard to the water was that he asked me  
 “ about the water, and I told him we never had  
 “ any trouble except with one vessel; that we had  
 “ one to catch on us there, but we had extremely low  
 “ water and a northwest wind. I told him that we  
 “ had had it dredged out and the man that dredged  
 “ it reported 14 or 15 feet of water. He said, ‘I  
 “ don’t draw that much water when I am loaded.’  
 “ I said that is the report he gave Mr. Smith; that  
 “ he took out between 200 and 300 yards of stuff  
 “ and he reported 14 or 15 feet of water. That is  
 “ the only conversation ever I had with the cap-  
 “ tain.

“ Q. The only one?

“ A. That is the only one in regard to water. I  
 “ think that was on Friday; probably it might have  
 “ been on Thursday. \* \*

“ Q. What advice or suggestion did you make to  
 “ the captain about sounding for himself?

"A. I told him to make his soundings—probably that might have been the time when we were talking about that depth of water.

"Q. What did he say?

"A. He didn't say anything. He and the mate went to sounding and the mate did the sounding. The captain was present there" (p. 344, fol. 613).

The real question is, was the master wanting in due care for the safety of his vessel in not moving her out on the high tide of Saturday night—considering all that he is shown to have known concerning her condition and the condition of the bottom and of any danger to her then existing—and did he fail to do this in spite of being advised and urged to do it by the appellants or their foreman?

The questions on which there is great conflict as to what the conversations were between the master and speaker, the foreman, on Saturday, are only important as bearing on the actual existing state of affairs and on the master's knowledge of it

What, then, was the condition when the appellants' men knocked off work Saturday at about 5 o'clock?

Shortly before 5 o'clock the master noticed that the vessel was about eighteen inches to two feet by the head, drawing 12.10 forward and about 10.10 aft (p. 47, fol. 73; p. 49, fol. 75). Between 3 and 4 o'clock he had breasted her off about two feet further than she was before and sounded and found no less than thirteen and a half feet anywhere around her (p. 47, fol. 73).

They had been loading since early Thursday morning, into the after hatch till 2 o'clock Friday, and from that time, after hauling the vessel, say from 2.30 or 3 o'clock, till Saturday at 5 o'clock, into the forward hatch.

The regular time of beginning the day's work was 7 A. M. They stopped for dinner from 12 to 1, and working ten hours a day, the regular time for

knocking off was 6 P. M.—earlier on Saturday—about 5 o'clock (*Twiford*, p. 139, fol. 235; *Smith*, p. 311, fol. 550).

It is generally agreed that they took on board in the three days about 400 tons. This is what Mr. Speaker told the captain.

If this had been delivered along at a uniform rate there would have been delivered into the after hatch during 16 hours about 225 tons, and into the forward hatch during 12½ hours only about 175 tons.

The stone was not weighed as passed into the vessel. The only mode the appellants had of measuring the quantity was that an account was kept somewhere of the weight of stone delivered on each scow or barge to the hoister, by which it passed into the crusher. Of this the master knew nothing and it does not appear that it was consulted by Speaker. As between the appellants and the vessel the return of the Government officers at Fortress Monroe was always accepted as final (*Speaker*, pp. 367, 368; *Smith*, p. 296, fol. 522).

Therefore there was no motive for any one during the loading to inquire or observe even approximately how much the vessel was receiving, and Speaker admits that he could not tell the amount with any precision (p. 367, fol. 657).

Mr. Speaker, however, has in his testimony given important evidence as to the actual rate of delivery and the proportions for the three days. The chute did not work well the first day, because the slope of the iron chute to the hatch was not steep enough, the vessel being light and high in the water. His rough estimate is 100 tons Thursday, 200 tons Friday and less than 100 tons Saturday (*Speaker*, pp. 367, 368, fols. 657, 658, 659).

(a.) As it appears from the testimony that the last part of the cargo was to be put on board by wheelbarrows after the vessel was moved out (fols. 600, 604, 645, 667), it is grossly improbable that 300 tons were put into the after hatch. The very object of having a part of the cargo of a deep draft vessel put on by wheelbarrows was that she should be moved out before she was in danger of touching the bottom. The appellants were in the habit of doing this although it cost them twenty cents a ton more (Smith, fols. 517, 552). 400 tons was the amount she was to take on where she lay, and the obvious policy both of the foreman and the master would be to distribute this with substantial equality between the two hatches. Speaker's statement, which, to be sure, is an estimate only, that 300 tons was deposited in the after-hatch, is, like many of his statements to which attention is called in this brief, a misstatement and misleading statement, inconsistent with other proved facts, and recklessly or carelessly made in the interest of his employers. Moreover, Speaker contradicts himself on this very subject. At folio 677, he says or implies that all of the 200 tons put on board on Friday were put into the after-hatch, whereas elsewhere he estimates the whole amount delivered on Friday to be only 200 tons, and certainly from half-past two or three o'clock until the close of the day, six o'clock, they were loading into the forward hatch, and all that was put on board on Saturday, which he estimated at about 100 tons, also went into the forward hatch (fols. 657, 658 and 659).



This shows that there was no such inequality in the proportionate deliveries. (a)

But the master having the impression, perhaps from the greater length of time that the deliveries in the after hatch exceeded those in the forward hatch, found a little before 5 o'clock, that the vessel was by the head more than he could account for by what he knew as to the cargo (p. 62, fol. 97). Smith had told him they could load about 150 tons a day (p. 46, fol. 72). The captain could not tell how much stone went in (p. 66, fol. 104).

He says that he told Speaker he thought he was aground or touching (do., do., p. 67, fol. 105). *p. 47, fol. 73*

Speaker denies this, but admits that he said he *believed* he was "ebbing out" (p. 338, fol. 601).

Which expression he understood to imply that he was aground (p. 374, fol. 671; p. 339, fol. 604).

*According to both it was merely a suspicion on the part of the Captain.*

Another witness says that the captain used the expression "ebbing out."

There is no definition of this expression, but it may be taken to mean that as the tide ebbed the vessel was left out of the water. It is somewhat similar to the expression used by Captain Cole, of the *Baird*—that he found his vessel was out of the water as the tide fell (*Cole*, p. 279, fol. 490).

However, the mode of expressing it is of no consequence. The material thing is that the master attributed the vessel being by the head to her touching the ground, and that he communicated this idea, this apprehension, to Mr. Speaker, and they both agreed that they had better not continue, lying where she was, to load her by the forward hatch.

The captain says, however, that when he told Speaker what he thought, Speaker disagreed with it, and said she was all right (p. 47, fol. 73). *If* this

(b) *Speaker also told Goffey, Alpelians' employee, on Saturday, at the close of work, that the vessel lay all right, in answer to his question if he was going to shove her out, (p. 199), and Speaker was the foreman and generally directed where wheelbarrows should be used (Caylon, p. 429, fol. 793).*

was so, Speaker must have attributed her being by the head to the way the cargo had gone in, and he knew more about this than anybody else. (a)

Speaker denies this, though he admits that the captain called his attention to her being down by the head (p. 374, fol. 669), and on the stand he doubted whether she was by the head (do., do.). His subsequent conduct, however, shows that the master is right in this, and that Speaker may have forgotten it. Speaker said at any rate that they would knock off in a few minutes, and they did so.

Shortly afterwards, after six o'clock, the master took careful soundings all around the vessel and these reassured him and convinced him that she was afloat (pp. 62, 63, fol. 98).

They also had talk that day about putting in another scow and continuing the loading by wheelbarrows (*Hankins*, p. 48, fol. 74; *Speaker*, p. 336, fol. 598).

This, of course, implied the removal of the iron part of the chute, for it could not remain in the hatch while they were moving the schooner out (*Speaker*, p. 339, fols. 603, 604).

And it is certain that Speaker let all his men go, not to return till Monday morning.

It is also certain that the master, after the men had left work, of his own suggestion, asked Speaker to call them back to take down the iron chute. Both agree on this.

It is quite certain that the master's purpose in this was that he with his own crew might shove the vessel out before the loading was recommenced Monday morning.

It is also certain that the men came back—5 or 6 of them, Speaker says—and took the chute down (p. 338, fol. 602).

But there is a difference between the master and Mr. Speaker at this point, as to what was said when the men were thus called back and what the master's purpose was.

The master's account is as follows: After the men left, it occurred to him that there would be loss of time Monday morning if the chute had to be taken down on Monday and the vessel shoved out before resuming the loading of the vessel, and therefore he thought he would have the chute taken down then, with the expectation of his moving the vessel out before Monday morning.

Speaker's account is that the master said he wanted to or would shove her off at high tide. He does not pretend that the master said the *next* high tide, which would have been about midnight that Saturday night. Other witnesses testify that the master spoke of shoving her off at high tide, but no witness says that he spoke of the *next* high tide and the language used did not imply that.

As to this, the master says he did not say at high tide, but he may have said *at slack water* (p. 511, fol. 920).

The master undoubtedly would, if he moved her at all, move her at slack water, when he could handle her more easily and more safely.<sup>(a)</sup> This comes only at high or low tide, and as there was still a possibility, notwithstanding his soundings and the effect of them on his mind, that she might touch at low water sufficiently to make it difficult to move her at low tide, it is almost certain if he carried out his purpose of moving her out before Monday morning, he would do it at high tide.

There would be two high tides before Monday morning—one at midnight Saturday, the other about 1 o'clock on Sunday afternoon.

Questioned about his intentions the master says, that while he didn't generally like to work Sundays

(a) The mate was away and the Captain seems to have had only three men (Endicott, fol. 396; Barclay, fol. 57; Stevens, fol. 465; Thompson, fol. 470).

he thought he would have moved her out Sunday if the weather was good. Otherwise he would have waited till Monday (p. 68, fol. 107).

Apparently to give plausibility to Speaker's theory that the master's intention was to shove the vessel off at the *next high tide*, Speaker says that the master said she was making a little water, and that he didn't want her to get more by the head because the water would get away from the pumps (p. 338, fol. 601).

This is denied by the master (pp. 512, 513, fol. 922).

And both parts of the statement are grossly improbable.

In the first place, the master positively denies having said that she was leaking or was making water (p. 513, fol. 922).

As to the fact that she was not leaking Saturday evening, the master is corroborated by several witnesses (*supra*, p. 14).

The leak by which she was found to be sinking the next morning at 8 o'clock was so serious a leak that the pumps made no headway against it. That she did not leak on Saturday night is also shown by the fact testified to by the master, and which is in no way contradicted or controlled by other testimony, that when he got up in the morning at 6 o'clock she was no deeper in the water than she was the night before. He observed her marks forward, which would clearly have shown him if she was any deeper in the water (p. 61, fol. 96).

If she had sustained the injury by which her seams were opened and a serious leak or any leak from which water would have been found in her the night before, she would have filled before morning. Assuming, as is very likely true, that she did touch the night before, although the captain was satisfied by soundings and by the assurances of

Speaker that she was afloat, then it is quite clear, upon all the evidence, that by grounding at low tide on Saturday she sustained no such injury as made her leak. Like the *Baird* she grounded, but did not that time spring a leak. And it is equally evident that when she touched on Sunday morning, within an hour or two of low water, somewhere between 6 and 8 o'clock, she did sustain an injury by which the seams of her centreboard well were opened and the leak so occasioned was so serious that all efforts to save her were in vain.

It is quite possible, in explanation of the different effect from the grounding on Saturday evening and on Sunday morning, that on Sunday morning she grounded upon the rock in such way as to bring the entire strain upon one side of the centreboard well, or more on one side than was the case the night before. If she floated, as seems probable, at high tide on Saturday night, she might not then come down upon the rock Sunday morning in precisely the same position. Firmly as she was moored by lines and the pole connecting her with the wharf, her position might be slightly shifted while afloat. There is nothing, therefore, improbable in the account given by the master and the other witnesses of the fact that she sustained no injury when aground, as she may have been on Saturday night, and yet sprung a sudden and serious leak by settling down on the rock in nearly the same place on Sunday morning. It is, therefore, improbable that the master told Speaker that she was making water, because the proof is she was not.

And here the master is corroborated both by the contemporaneous memorandum of Chas. G. Smith, Jr., and by his sworn answer. The memorandum says that "Speaker left for the night, with the distinct understanding that the vessel lay all right for the present" (p. 468, fol. 846). And the answer says that "the master said he was lying all right." As Smith was not there he must have got these statements from Speaker, and they are entirely in-

consistent with the vessel's being known to be then leaking, or with Speaker's having any knowledge of facts tending to show that she was in any danger. But for the master's own request he would have left the chute in and she would have remained there till Monday morning.

The other part of Speaker's statement is equally improbable, namely, that the master did not like to have her more by the head, because the water would get away from the pumps. This vessel had three pumps, one at the bow, forward, one amidships and one astern, and the pump forward was calculated to take out all the water that should settle in the forward part of the vessel. It would be a very senseless observation for the captain to make, and he denies that he did make it (p. 513, fol. 922).

Her three pumps were first-class, and when she was rebuilt it was not thought necessary for her to have more than two, and the one amidships was dispensed with (*S. W. Smith*, p. 554, fol. 992).

Speaker also says that the talk about two scows and breasting the vessel out with two poles was not with the idea of continuing the loading on Monday with wheelbarrows, but of leaving her in safety over Sunday, and then taking away the second scow Monday morning and moving her in as far as she could and continuing the loading with the chute until they found they could not do it and then to use wheelbarrows. This is denied by the master (pp. 511, 512, fol. 920).

This mode of loading the vessel, moving her in and out after Monday morning and taking out one of the scows for the purpose of moving her in and out, is not suggested by Mr. Smith. On the contrary, Smith says that what the captain had been told was that they had loaded the last part of the cargo of the *Sunlight* by wheeling the stone over two scows in wheelbarrows, and this is what the captain understood Speaker to suggest was the object of having the second scow there (*Smith*, p.

293, fol. 517; *Speaker*, p. 336, fol. 598; *Hankins*, p. 48, fol. 74).

The proposed method of loading on Monday morning, suggested by *Speaker*, was actually impracticable. The master has testified that if he had moved the vessel out and put in another scow it would take him an hour (p. 68, fol. 107). It would be very absurd to move her out the width of another scow to lie till Monday morning and then move her in again to receive her cargo by the chute, as *Speaker* says, "as close as they could." This seems to imply that they should move her part of the way in and then as she was more loaded move her out again.

Such a scheme would be wholly inconsistent with the theory of the appellants, that the object of moving her out was her own safety, for the deeper she got in the water the more dangerous it would be for her to be moved in. Moreover, there would be great waste of time in moving her out, then moving her in, and then moving her out again. And unless she was really moved back where she was before, it would probably be impracticable to continue loading her with the chute, as Mr. *Speaker* says they had trouble the first day when the vessel was high out of the water in making the chute work, because the inclination was too little; the stone blocked up the passage (p. 378, fol. 678). This difficulty would be encountered the moment they moved her out from the position she then was in, further away from the wharf.

Upon the whole testimony of Smith, *Speaker* and the master, it seems very improbable that any such method of loading as *Speaker* suggested might be adopted on Monday was suggested at all. The suggestion seems to have been made to give plausibility to his theory that it was considered necessary for the safety of the vessel only, to shove her out before Monday morning.

Moreover, this suggestion of *Speaker* is utterly inconsistent both with Smith's memorandum and his answer. Both assert that the object of putting

in another scow was to put in the rest of the cargo by wheelbarrows (Memo., p. 468; fols. 845, 846; Ans., p. 18, fol. 28), and Smith details the method of loading when two scows were used (pp. 309-310, fol. 544).

The real question, then, being whether the circumstances in which the vessel was placed and the information the captain had of her danger were such that it was negligence in the master not to *rouse his crew at midnight that Saturday night* to shove the vessel out instead of waiting till slack water on the next high tide in the afternoon of Sunday to do it, the relative theories of the parties on this question are these: The master's theory is that he was in no known danger on Saturday night, even if she did slightly touch the bottom, and that the removal of the chute was merely to save time so that they could begin work promptly Monday morning, and his intention was and expressed purpose, to shove her out and put in the scow before Monday morning, and even if he referred to high water it did not mean the next high water.

It does not affect the argument if he did say he would shove her out <sup>or at</sup> on ~~the~~ high tide, unless he meant the next high tide, of which there is no proof whatever.

Mr. Speakers' theory, and that of the appellants, is, that the master was alarmed for her safety and wished to get her out as soon as possible, that is on the next high tide, and that this was his object and declared purpose in having the chute removed.

Upon these two theories we make the following observations:

There was nothing improbable in the master's statement that he was satisfied after making soundings that she was floating. He sounded all around the vessel and found plenty of water for her then lading. The only caution he had received with regard to her position was that which he had received from Mr. Smith, that he had better sound *around*



the vessel. He had no reason to suppose that there was any obstruction *under* the vessel of which he was not informed. His judgment as to the effect of the cargo put on board in making her tip forward was simply a rough estimate of the relative amount of cargo put into the aft and forward hold, probably derived from his recollection of the length of time she had been loading in the two hatches respectively, and the effect which these amounts would have in tipping her; but he had no real knowledge of the cargo put in. It does not appear that he was in the hold at all.

The case might have been quite different if the master knew with certainty that there were 300 tons aft and only 100 tons forward (*S. W. Smith*, p. 559, fol. 1000). But this was not the fact nor did the captain know how much was put aboard.

The trimming of the cargo was attended to by the mate, as *Speaker* admits (p. 339, fol. 605), although of course, like everything else in regard to the care of the vessel, it was under the master's direction, but it does not appear that he actually took any part in the trimming or that he was below at any time on Saturday, nor has either party seen fit to produce any evidence of the appearance of the cargo in the hold, as evidence of the relative amount forward and aft, although the four or five trimmers employed were appellants' men (*Speaker*, p. 355, fol. 635; p. 367, fol. 657). *Speaker* was frequently on the vessel to look after them (Bitter)

In the next place it does not follow because a larger amount of stone may have been put into the after hatch than into the forward hatch, that she might not tip forward. There is a drawing of the deck put in evidence, made to a scale by the witness *Brewer* (see Exhibit 7, *Brewer*, opposite p. 290).

By that drawing it is seen that the forward hatch was nearer to the bow of the vessel than the after hatch was to the stern of the vessel, and this difference might give considerable more effect to the dumping of the cargo into the forward hatch than into the after hatch.

There is nothing, therefore, we say, improbable in the master being satisfied by the soundings that he was mistaken, and that, after all, her tipping forward was caused by the way the cargo went in, and if the master is believed and if it be true as testified by the master, that he spoke of this matter to Speaker, and that Speaker said she was not aground, that would aid in producing the conviction in the mind of the captain, especially after he had sounded, that she was afloat, because Speaker knew more than he did about the quantity of stone put into the respective hatches.

Moreover, Mr. Speaker's conduct, in any view of the matter, tends strongly to show that he thought the vessel was in no danger Saturday evening. Mr. Smith has testified that on Saturday morning he told Speaker to be sure that the master was satisfied that the vessel lay all right over Sunday (p. 316, fol. 559).

"Q. Did you direct Mr. Speaker on Saturday to "breast the *Tobin* further out on that day?

"A. I didn't tell him positively as to just what to "do. I told him that I wanted the captain to be "satisfied that he was laying all right over Sunday."

In view of that strict order from Smith, it is inconceivable that Mr. Speaker, the foreman, should have intended to leave her where she was from Saturday night to Monday morning, with the iron chute still in the hatch, if he apprehended that she was in any danger from grounding, and this was certainly after the conversation between them about her touching or ebbing out, and after he knew that the captain thought she grounded. And yet it is certain that he sent his men away with the iron chute still in the hatch, the removal of which required the work of five or six of his men. It was not a thing for the captain to take out. It was a part of the machinery and apparatus of the appel-

(a.) The mere fact that a vessel may touch bottom at low tide, even if it were clear, as it is not, that the master may have thought this possible from Saturday's experience, is not of itself sufficient to suggest danger. Vessels constantly lie on the bottom without injury. What the appellants and their foreman had said to the master, as well as what they failed to say when it was proper for them to speak, naturally led him to believe there was no danger if she did touch bottom at low tide in this berth.

lants by which they loaded the vessel. The master and his crew were not called upon even to help in the removal of the chute. This shows that it was a matter wholly for the appellants to take care of. The admitted fact that after Speaker had let his men go the captain desired him to recall them, in order to take out the chute, shows that he did expect before the captain made this request that she would remain where she was with the chute still in her hatch till Monday morning. And his conduct shows either a total disregard of Smith's positive injunction to have the captain satisfied or that he thought she lay all right till Monday morning. All this tends strongly to confirm the captain's testimony that he was satisfied by the assurances of Speaker and by the soundings that she was all right, and tends to make it improbable that she was making water or that the captain said so. If such had been the fact known to both of them, the conduct of both would be inexplicable. Again on this point the captain is confirmed, and Speaker refuted by the memorandum and by appellants' answer (*ut supra*). The master was fully justified under the circumstances in apprehending no danger where Speaker, who knew or ought to have known the character of the bottom, was content to have the vessel lie where she was till Monday morning.<sup>(a)</sup> Again, there is a total absence of proof that Speaker advised the shoving out of the vessel, either immediately or on the next high tide, or at any time. So far as he was concerned, it was all left to be done on Monday morning, but the captain voluntarily and for the purpose of saving time requested these arrangements to be made in order that he might shove her out before Monday morning, if he saw fit and found it convenient. (b)

There are some details of evidence on which the master and Speaker contradict each other, but they do not seem to be material to the main question, which is, whether on that Saturday night, under circumstances then known to the master, there was

(b) Neither appellant was there on Saturday during working hours and Speaker was their representative (p. 369, fol. 661).

any such reason to apprehend danger and the case was so urgent that it was his duty to call up his crew at midnight, when there would be slack water, for the purpose of moving out the vessel. It seems clear upon the proofs that there was no such obvious danger or apparent danger or reason for apprehension on the part of the master, and that therefore this specification of negligence in the answer that he did not move her out into deep water when advised to do so, and did not place an additional scow between the schooner and the wharf, as urged to do, is wholly unproved.

3. The third and last specification of negligence is that the master did not pump out said schooner when found to be in a leaky condition and did not take measures to prevent her from sinking when it was known that she was leaking.

After breakfast on Sunday she undoubtedly was known to be in a leaky condition. They had just discovered it. She undoubtedly sprang a leak by settling down on the rock, as the tide fell Sunday morning. The proofs that she was not in a leaky condition or leaking on Saturday night have been all sufficiently referred to (*supra*, pp. 14, 50-54). That the master did all he could Sunday morning to save the vessel is perfectly obvious. He immediately put the pumps at work. The vessel was well provided with pumps, having three in number, forward, amidships and astern. They had no effect upon the leak; the water gained. The master then tried to get help from the outside, but found it very difficult to get any assistance. He hired some colored men to keep up the pumping. He attempted to get a fire engine or a steam pump, but failed to do so; and at noon, when she was full of water, the effort of pumping was given up and it was obviously too late to save her (*Hankins*, pp. 48-50).

This specification, so far as it relates to neglect of duty on Saturday night, to which it probably intended to refer, is wholly unproved, because she

was not then leaking, and as before in this brief explained and shown from the testimony, there was no reason for apprehension on the part of the master that she was likely to leak. The mere fact that the vessel may have touched or taken the ground at low tide on Saturday evening, was not in itself a circumstance naturally to alarm the master. Hundreds of vessels ground in a harbor or a berth without injury. In hundreds of berths there is little or no water at low tide, and the vessels lie in the soft bottom. It is the nature of the bottom which constitutes the danger, its unevenness and the fact that it is incumbered or obstructed with rocks or other hard substances, and not the mere fact of grounding. The fact that this was a rocky bottom is not claimed to have been communicated to the master—nor was he told of the effect of grounding on the *Baird*, although this was known to Smith and Speaker. No authority is shown for charging negligence against the master in not keeping a watch on deck when moored at a wharf, and nothing happened from the want of a watch that affects the questions in this case. There was nothing in the appearance of the vessel in the morning when the master came on deck about 6 or half-past 6, which indicated any danger. Nothing happened in the night to indicate danger. There was a watchman on the scows belonging to the appellants at this wharf working all night pumping the scows till 6 o'clock. Nothing attracted his attention about this vessel (*Kroom*, pp. 546-550).

If this witness is to be believed, the scow which Speaker says he provided to be put inside of the *Tobin* was not fit for the purpose. It was only partly unloaded and leaking badly (do., do.).

It is not necessary for the vindication of the master against the charge of negligence that the points on which he is in conflict with Mr. Speaker, should be decided in his favor, and without going into these disputed details, on facts proved by a

large preponderance of evidence the master was not chargeable with negligence.

It is true, however, with regard to all these specifications of negligence charged against the master, that the Courts below had before them conflicting evidence and the question of the credibility of witnesses, upon the determination of which their view of the case in favor of the master may have turned in whole or in part. The trial Court and the Court of Appeals are peculiarly the tribunals appointed for the determination of such questions of fact, and the Court below was fully justified in dealing with this question of the alleged negligence of the master, as the matter is summed up in the opinion of the learned Chief Justice (p. 696).

“ And there is an entire failure of evidence to establish the fact, as attempted to be shown by the appellants, that there was want of due care on the part of the master, and a failure to exercise proper supervision for the safety of the vessel while she was moored at the wharf for the purpose of being loaded.”

VII.—*There is no basis in the evidence for the charge in the answer of the appellants that the greater part or any of the loss of which the libellants complain would have been avoided by a more prompt or skillful effort to raise and remove the vessel* (Answer, p. 19, fol. 29).

The efforts made by the master and owners and by Mr. Hagner, the attorney for the owners, to get the vessel removed, and the difficulties they encountered, are set forth in great detail in the testimony.

*Hankins*, pp. 50-55.

*Endicott*, pp. 213, 217-223, 233-236.

*Burnett*, pp. 184-192.

*Hagner*, pp. 174-177, 254.

*J. B. Lord*, pp. 149-151.

There was some not unreasonable delay before the owners were satisfied that it was their duty to remove the vessel. They then had great difficulty in finding proper persons to undertake the work. They first proposed to wreckers to raise and remove her. They got no offer better than \$8,000, which, on consultation with the appellants, was rejected as unreasonable. They then pursued the policy of first taking out the cargo, and after a second attempt by Mr. Lord, this was accomplished before the 1st day of November, under the second contract with Lord, dated October 3d. She was then sold as a wreck, after being condemned by surveyors (Survey, p. 11). That she was a complete wreck and worthless is fully shown in the preceding points on the evidence. There is no proof whatever that by her remaining sunk as she was from the 6th of August to the 23d of November, she sustained any new injury. On the contrary, the evidence of those who repaired her is that she was in all other respects, except this break, a sound, strong vessel, notwithstanding the delay and her immersion in the salt water, but that by sinking on the rock she became a complete wreck and of no real value. The conclusion of the Court of Appeals on that point is well sustained by the evidence, as follows:

“ After she had sunk, nothing remained to be done  
 “ but to get out the cargo, and to remove the wreck,  
 “ which the owners were required to do under the  
 “ statute. Under the circumstances of the case, we  
 “ see no ground for holding that the injury was  
 “ increased or the damages in any manner enhanced  
 “ by the delay in attempting to raise and remove  
 “ the vessel ” (Opinion, p. 699).

The statute referred to by the Court was Stat. 1890, Ch. 907, Sec. 10; 26 Stats., p. 454, which was as follows:

“ Sec. 10. That the creation of any obstruction,  
 “ not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which



“ the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week’s continuance of any such obstruction shall be deemed a separate offense.”

Then follows a provision imposing a penalty of fine and, or, imprisonment for every such offense.

## POINTS.

### I.

*It being proved that the vessel was injured and wrecked in the bed of the river within the berth occupied by the vessel in front of the wharf of the appellants, and that the appellants assigned this berth to the vessel without any notice to or knowledge on the part of the master or owners of such obstruction, the appellants were liable by the maritime law as for a maritime tort for the resulting damages. And the evidence showing that appellants had notice of this obstruction they were clearly liable in this action, and even if they had succeeded in proving that they had no knowledge or notice, then they were liable upon the ground that they were guilty of negligence, and the want of reasonable care which the law required of them in not ascertaining the existence of the obstruction.*

1. That this is a case of maritime tort and that the Court of Admiralty had jurisdiction is conclusively shown by the case of *Philadelphia, Wilmington & Baltimore Ry. Co., appellants, v. Phila. & Havre de*

*Grace Steamboat Co., 23 How., 209.* In that case the appellants were authorized by a statute of Maryland to construct a bridge over the mouth of the Susquehanna River at Havre de Grace. They entered into an agreement with certain contractors to prepare the foundations and erect piers. In pursuance of this contract these persons drove piles, called "sight piles," in the channel of the river under the direction of the engineers employed by the appellants. Before the completion of the contract the appellants abandoned their purpose of completing the bridge and discharged the contractors. The piles were not removed or cut off level with the bottom, but were cut a few feet under the surface of the water, so that they became a hidden and dangerous nuisance. The steamboat *Superior* left her port in Maryland and came into collision with one or more of these piles, in consequence whereof she suffered damages for which the libel was filed. It was held by this Court, *first*, that the liability of the Courts of Admiralty in tort depends wholly on locality. *Secondly*, that "torts" are not limited to wrongs or injuries committed by direct force, but include wrongs suffered by the negligence or malfeasance of others, where the remedy is by an action on the case, citing as a rule of admiralty law from the earliest days, that if a ship runs foul of an anchor left without a buoy, the person who placed it there shall respond in damages" (see 1 Emerigon, p. 417; Consul de la Mer, Ch. 243; Clerac, 70).

2. In *Carleton v. Franconia Iron & Steel Co., 99 Mass., 216 (1868)*, the case was tort for injury to plaintiffs' schooner by being sunk and bilged in the dock adjoining defendants' wharf. The defendants owned and occupied a wharf fronting on navigable waters in Wareham River, where the tide ebbed and flowed. The defendants had dredged out the adjoining dock for berths for vessels which were accustomed to come with iron and coal for the defend-

ants' foundries situated on the wharf. There was no other proof of ownership by the defendants. There was and always had been "a large rock sunk in the water and thereby concealed from sight, dangerous to vessels, and so situated that a vessel of the draft to which the water at said wharf was adapted, being placed at high water at that part of the wharf, would lie over the rock, and by the ebb of the tide would settle down and rest upon the same."

The defendants had notice of the existence and position of the rock and of its danger to vessels (the same having been pointed out to their superintendent in 1864, two years before the injury), but they neglected to notify the plaintiffs.

The plaintiffs' vessel came to the wharf in 1866 by procurement of defendants, bringing a cargo of iron for them under a verbal charter.

*Gray, C. J.*, after laying down the rule of law that the owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of, says:

"It does not, indeed, appear that the defendants owned the soil of the dock in which the rock was embedded; but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to their wharf; and such vessels were accustomed to occupy it, and could not discharge at that point of the wharf without doing so. \* \* \*

"Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for an injury occasioned by it to a vessel which they had induced for their own bene-

" fit to come to the wharf, and which, without  
 " negligence on the part of its owners or their  
 " agents or servants, was put in a place apparently  
 " adapted to its reception, but known by the de-  
 " fendants to be unsafe. This case cannot be dis-  
 " tinguished in principle from that of the owner of  
 " land adjoining a highway, who, knowing that  
 " there was a large rock or a deep pit between the  
 " traveled part of the highway and his own gate,  
 " should tell a carrier bringing goods to his house  
 " at night, to drive in, without warning him of the  
 " defect, and who would be equally liable for an  
 " injury sustained in acting upon his invitation,  
 " whether he did or did not own the soil under the  
 " highway."

In *Nickerson v. Terrell*, 127 Mass., 236 (1879), the  
 case was that of the plaintiff's vessel being injured  
 at the defendant's wharf by grounding in the muddy  
 bottom which was in ridges caused by other vessels  
 lying there, and possibly by coal and other hard  
 substances in the river bottom. The tide left the  
 dock bare at low water; vessels then lying in the  
 mud, as the master of plaintiff's vessel knew. The  
 question was whether the defendant had exercised  
 due care in regard to the condition of the dock. The  
 vessel was wider than vessels that usually lay there,  
 but this was not shown to be known to the defend-  
 ant. *Morton, J.*: " The general rules of law applic-  
 " able in cases of this character are well settled.  
 " The owner or occupant of a dock is liable in  
 " damages to a person who, by his invitation, ex-  
 " press or implied, makes use of it, for an injury  
 " caused by any defect or unsafe condition of the  
 " dock which the occupant negligently causes or  
 " permits to exist, if such person was himself in  
 " the exercise of due care. Such occupant is not  
 " an insurer of the safety of his dock, but he is re-  
 " quired to use reasonable care to keep his dock in  
 " such a state as to be reasonably safe for use  
 " by vessels which he invites to enter it,  
 " or for which he holds it out as fit and

“ready. If he fails to use such due care, if there is a defect which is known to him, or which by the use of ordinary care and diligence should be known to him, he is guilty of negligence and liable to the person who, using due care, is injured thereby (*Wendell v. Baxter*, 12 Gray, 494; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass., 216; *Thompson v. Northeastern Railway*, 2 B. & S., 106; *Mersey Docks v. Gibbs*, 1 L. R., 1 H. L., 93).”

“In the case at bar, there was conflicting evidence as to the state of the dock, and as to the cause of the injury to the plaintiff's vessel, and the presiding judge was required to submit the case to the jury. He did so, with instructions which are in substantial accordance with the rules stated above.”

And in respect to the degree of care required of the master or vessel owner, the Court says (p. 240):

“The true rule was stated to the jury, that the master was bound to use ordinary care, and could not carelessly run into danger. We cannot say, as matter of law, that he was negligent because he did not examine or measure the dock and berth. It was for the jury to determine whether the conduct and conversation of the defendant excused the master from making any more particular examination than he did make, and whether, upon all the evidence, he used such care as men of ordinary prudence would use under the same circumstances.”

The same rule was declared in a case of knowledge of the defect by the wharf owner in *Barber v. Abendroth*, 102 N. Y., 406. And in *Sawyer v. Oakman*, 1 Low. Dec., 134, knowledge on the part of the wharf owner was presumed by the Court from the obstruction, a heap of coal, having existed several days, and from another defect, inequalities of the bottom, having existed several years. And in the same case on

appeal the decree below was affirmed, on this presumption, by *Woodruff, C. J.*, citing *Phila., &c., R. R. Co. v. Phila., &c., Steamboat Company*, 23 How., 209; *Parnaby v. Lancaster Canal Co.*, 11 A. & E., 223; *Mersey Docks Co. v. Gibbs*, 1 H. L., 93, which cases are hereinafter referred to.

In *O'Rourke v. Peck*, 40 Fed. Rep., 907, *Wallace, J.* (1887), held that the wharf owner is not excused by the fact that the vessel comes not on his invitation but on the invitation of another party by his permission or license.

In *Christian v. Van Tassel*, 12 Fed. Rep., 884 (1887), *Brown, J.*, held both parties at fault, the wharf owner for allowing the obstruction to remain, and the vessel for not noticing her condition when she grounded, and accordingly the damages were divided.

In the *Stroma*, 50 Fed. Rep., 557 (*C. Ct. of App.*, 2d Circuit, 1892), where the injury by a sunken wreck was known to both parties to exist and where the wharf owner's agent saw the vessel go to the place over the wreck and made no objection, it was held that the agent of the vessel was justified, although he knew the wreck was there, in assuming that the respondent's agent knew better than he did whether it was safe to berth her there or not; that the wharf owner should have satisfied himself it was safe before permitting her to berth there. (a)

In *Leonard v. Decker*, 22 Fed. Rep., 741 (1884), it was held by *Brown, J.*, that the owner of the wharf was liable for a defect which he knows or ought to know of. In that case the defect in the wharf was in bolts left in the sides of the wharf where some timbers had been removed; the vessel came in contact with these bolts, and on the subject of jurisdiction which was raised in that case, *Brown, J.*, says:

"It must appear that the damage as the substantial cause of action arising out of the negligence  
" "is complete within the locality upon which the  
" jurisdiction depends, namely, upon the high seas

(a) Upon all the facts this Court held the wharf not negligent in not discovering the hidden danger which caused the damage (166 U.

“or navigable waters.’ *The Plymouth*, 3 Wall.,  
“36.”

In *Pennsylvania R. R. Co. v. Atha*, 22 Fed. Rep., 920, D. C., N. J. (1885), *Nixon, J.*, reiterates the rule laid down in 127 Mass., as above, that the wharf owner is liable for what is known or, in the exercise of ordinary prudence and diligence, should be known.

The English cases, both at common law and in admiralty, lay down the same rules.

In *Thompson v. N. E. R. R. Co.*, 2 B. & S., 106; S. C., *Exch. Ch.*, do. 119 (1860), it was held to be the duty of proprietors of a dock opened for public use for profit, to take reasonable care to make their dock and basin safe for navigation before they open them to the public; and that it was no defense that the plaintiffs knew of the condition of the access to the dock, provided that the plaintiffs were not chargeable with want of ordinary prudence in exposing their vessel to the danger. As *Cockburn, C. J.*, puts it:

“Where danger has been created by the wrongful  
“or negligent act of another, if a man in the perform-  
“ance of a lawful act voluntarily exposes himself  
“to that danger he is not precluded from recover-  
“ing for injury resulting from it, unless the cir-  
“cumstances are such that the jury are of opinion  
“that the exposing himself to that danger was a  
“want of common or ordinary prudence on his  
“part” (citing *Clayard v. Dethwick*, 12 Q. Bench,  
439; S. C., 64 Eng. Com. L. Rep., 437, which fully  
sustains the ruling).

The case of the *Mersey Docks Trustees v. Gibbs*, L. R., 1 Eng. Ir. App. Cas., 93 (1866), was a review by the House of Lords of two judgments for plaintiffs for damages for defect in dock (S. C., 11 H. L. Cases, 686). In one case the owner of the wharf knew of the defect; in the other the finding is that *he had the means of knowing of it, but was*

*negligently ignorant of it.* It was held that there was no error in either case.

In the case of the *Calliope*, *App. Cases* (1891), 11, reported below, 14 *P. D.*, 128, the wharf owner was held not liable for want of evidence of any negligence on his part upon the proofs, and also on the ground that the master and the pilot in charge of the vessel voluntarily took upon themselves the risk incurred by attempting to berth her when and where they did, but the opinions of the law lords fully recognized the principle that a wharf owner who invites the vessel to come to his wharf on his business is guilty of negligence if a hidden danger in the berth exists which he might by reasonable diligence have discovered. They held with and approve the case of *The Moorcock*, 14 *P. D.*, 64, where *Lord Escher, M. R.*, thus states the principle:

“The appellants, wharf owners, can find out the state of the bottom of the river close to the front of their wharf without difficulty. They can sound for the bottom with a pole or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the water at low water is not material. Supposing at low water there are two feet always over the mud, this would make no difference. Persons who are accustomed to the water do not see the bottom of the water with their eyes; they find out what is there by sounding, and they can feel for the bottom and find out what is there with even more accuracy than if they see it with their eyes, and when they cannot honestly earn what they are desiring to earn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or, at all events, that they have taken reasonable care to find out that the bottom of the water is reasonably fit for the purpose for which they agree that their jetty should be used, that is, they should take reasonable care to find out in what condition the bottom is



“ and then have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so. That, I think, is the least that can be implied as their duty ” (14 *P. D.*, 67).

And to the same effect see, *The Calliope, L. R., App. Cases* (1891), by Lord Halsbury, approving *The Moorcock*, p. 14.

To the same effect, *Lord Watson*, pp. 21, 22 and 23.

To the same effect, *Lord Herschell*, pp. 27, 28 and 29.

Applying these authorities to the present case, it is evident that the wharf owner is liable, *first*, because of the actual knowledge of Charles G. Smith, Junior, as found by the Court below, which finding is fully sustained by the evidence of the actual notice to him of the existence of the obstruction at the time of the grounding thereon of the schooner *Baird*. *Secondly*, that both of the appellants are presumed to know the condition of the bottom of the dock in front of their wharf from having used it for several years. Such presumption held by the Court in the cases before cited rests upon *their duty to find out what the bottom was*. One of the appellants, Charles G. Smith, Senior, although having equal opportunities to find out the condition of the bottom and an equal duty to do so, has not denied his knowledge. He was not called as a witness. As to him, therefore, the cases in which the courts have indulged this presumption are controlling, and his knowledge is the knowledge of his partner. *Thirdly*, the master having been shown to have had no knowledge of the obstruction and having been cautioned only to sound *around the vessel*, and having done so, is, on the authorities above cited, wholly free from contributory negligence in the placing of his vessel. *Fourthly*, the evidence being clear that on Saturday night the master apprehended no danger to the vessel, and having no reason to apprehend danger from the mere fact of the possibility of

her grounding, in view of what he knew of the condition of the bottom, he was also free from contributory negligence in waiting till Monday morning, or the high tide of Sunday afternoon, before shoving out the vessel and putting in another scow.

## II.

*The vessel being a total loss, the appellants were liable for her value, and also for the reasonable expense incurred by them in raising and removing her.*

1. The question of value was much debated below. It was the subject of a difference between the Special Commissioner and the trial Judge. It was carefully reconsidered by the Court of Appeals, who say in their opinion, that the Court below did not exceed the reasonable limits of indemnity according to settled principles of law in the sums awarded (Opinion, p. 699).

2. The appellees called before the Commissioner two witnesses to value, both of whom were well acquainted with the vessel. *Endicott*, who was one of the owners, and perfectly familiar with her history and earnings, valued her at \$10,000 (*Endicott*, p. 602). She had originally cost, nineteen years before, \$30,000 (p. 601). He testified that at the time she was lost there was a fair market for vessels (p. 604, (*fol.* 1084); that he was largely interested in vessels himself, having an interest in about 58 or 60 (*do, do*); that a considerably smaller vessel then building for the owners would cost, when completed, \$16,000 to \$17,000 (p. 605, *fol.* 1085); that he based his estimate of value upon the general condition of the vessel and upon her earning capacity; that she had earned for her owners for five years past, fully

\$2,000 a year clear of all bills and running expenses (*p.* 605, *fol.* 1086).

When examined afterwards in open Court he testified further that, comparing the *Ellen Tobin* with the vessels he bought in and built in in the year 1893, *the reasonable market value* of the *Ellen Tobin* in 1893, just before her wrecking, was \$25 a registered ton, which would be a little over \$10,000 (*p.* 662, *fol.* 1192); that she was a desirable size for a great many lines of business and useful in that way; that she was desirable in the line of business in which she was engaged (*p.* 663, *fol.* 1193); that vessels engaged in the off-shore business, that is, foreign business, could not be fairly classed and compared in value to schooners like the *Tobin*, because they came in competition with English vessels, which were allowed to engage in foreign, but not in the coastwise trade (*pp.* 663, 664, *fol.* 1194); that the *Tobin* was well built, first-class in every respect, of heavy timbers, well fastened, of good lumber; that there was a good fair market for vessels of that class at that time (*pp.* 664, 665, *fol.* 1196); that within 7½ years \$13,000 had been expended in repairs on the *Tobin* (*p.* 665, *fol.* 1197); that at the time of her loss she was not in need of any repairs (*p.* 666, *fol.* 1198). On *cross-examination* he testified that the vessels he bought in in 1893 were the *Jesse W. Starr*, 292 tons; the *George Churchman*, 268 tons; that they were built in the same year with the *Tobin* (*pp.* 666, 667, *fol.* 1200); that the *William B. Steelman*, within five tons of the *Tobin*, and, like her, a double-decker and a centre board vessel, sold in 1893 for \$8,000 (*p.* 668, *fol.* 1202).

*John S. Mathis*, a shipbuilder, testified that to build the *Ellen Tobin* in 1893, would have cost about \$30,000 (*p.* 671, *fol.* 1208); that the fair market value of the *Tobin* in August 6, 1893, would have been \$10,000 (*p.* 672, *fol.* 1210); that she was fairly worth that, comparing her with the vessels named in Mr. Endicott's list, being a list of vessels bought in and built in by Endicott (*Exhibit*, *p.* 652; *Endicott*, *p.*

652, fol. 1173); that the list showed the *George Churchman* built in 1874, bought in May, 1893, tonnage 268, price \$8,000; the *Gracie D. Chambers*, built 1875, tonnage 360, bought July, 1890, \$17,000; the *William B. Steelman*, built July, 1875, tonnage 419, bought July, 1892, \$8,000; the *Jesse W. Starr*, built in 1874, tonnage 292, bought July, 1893, \$7,200.

The witness on cross examination showed a large experience in building and owning vessels, and testified further that he fixed the market value at \$10,000 by comparing it with other vessels of the same dimensions, "that is, what we value them at and what they have been sold for lately, within the last 4 or 5 years" (p. 681, fol. 1226).

*Endicott* testified that he bought in May, 1890, one thirty-second in the *Ellen Tobin* for \$280, which is at the rate of \$8,960, at public auction (p. 621, fol. 1115).

The appellants called eight witnesses :

*Crowell*, a marine adjuster and appraiser, from Baltimore (p. 609), who, upon the *Ellen Tobin* being described to him, testified that in his opinion she was reasonably worth in August, 1893, \$3,200 (pp. 610, 611).

*Clarridge*, also of Baltimore, a ship-chandler and grocer, and who had owned some vessels, barks, ships, brigs and schooners, and who had seen the *Ellen Tobin*, but not for a number of years, testified that a vessel of that description, supposing her to have been in good order, was reasonably and fairly worth in August, 1893, \$2,500 (p. 611, fol. 1098; p. 612, fol. 1099). He testified that the market in August, 1893, for vessels of the class of the *Tobin* was very poor; that vessels have not been making any money, and that he was not getting any profit from his own (p. 613, fol. 1100).

*Gilkie*, a master mariner, who had seen the *Tobin* once in Philadelphia some years before—ten or twelve years—answered from the description given to him that she was reasonably and fairly worth from \$2,500 to \$3,000; that that would be a fair

market value for her if sold (*pp.* 615, 616, *fol.* 1105); that he based his opinion upon the fact that she could be built for \$18,000 now, all ready for sea.

*Bennett*, a shipwright, of Washington, testified that he saw the *Ellen Tobin* when lying at the bottom at Georgetown, with stone in her (*p.* 626, *fol.* 1124). He was examined with regard to the probable cost of repairing her and testified that in his opinion she could not have been repaired for \$5,000 (*p.* 627, *fol.* 1126). He did not testify as to her value before the injury.

*Martin*, a witness much relied on by the appellants, was a marine surveyor for the New York Board of Underwriters (*p.* 630). He was in the habit of valuing vessels for purposes of general average, but not often old vessels, as there were other surveyors who did that (*p.* 630, *fol.* 1131). He had no recollection of ever seeing the *Tobin*. In answer to the question containing her description as taken from the record, he was unable to say whether there was a general demand or market for vessels of her class in August, 1893; that the market generally for vessels of all classes was very dull and had been for some years (*p.* 631, *fol.* 1133); that the adjusters used to have a rule some years ago, allowing 5 per cent. depreciation up till ten years of age, and after that something about 3 per cent.; that he would consider the vessel at ten years old worth half the original cost, and at twenty years a quarter or about that (*p.* 632, *fol.* 1134); that in his judgment \$10 a registered ton would be a fair value for her (*p.* 631, *fol.* 1133); that his opinion of valuation at \$10 a ton was based upon the sales of vessels about that time, within a year of it (*p.* 632, *fol.* 1134); that assuming that the vessel cost originally \$30,000, and had been kept up well during her life from 1874 to 1893, he thought she would be reduced in value to one-quarter in twenty years (*p.* 634, *fol.* 1137); that he knew of no vessel of the class of the *Tobin* sold in 1893, that is, not of her tonnage, or for a good while (*p.* 644, *fol.* 1138).

*The witness was unable to give an opinion as to the value of a vessel of the class of the Tobin, substantially new in 1893 (p. 637, fol. 1144).*

*Melbourn P. Smith, of Brooklyn, a ship broker and ship owner in a small way, had had no actual transactions showing the market value of vessels of the class of the Tobin in August, 1893 (p. 638, fol. 1146). The vessel being in general terms described to him, he said, "I should set the value of vessels of that description from \$7 to \$10 a ton on the register, according to the condition they might be in." If in good condition, \$9 a ton (p. 639, fol. 1147). He gave an account of vessels which he bought as a broker, some of which were as follows:*

*Schooner D. D. Haskell, 1891, 317 tons; built in 1881; \$5,000. The H. J. Cottrell, built in 1882; 336 tons; \$6,000. The bark Jose D. Bueno, 398 tons; built in 1875; bought in 1893; \$5,200 (p. 640, fols. 1148, 1149).*

*Jones, of Brooklyn, a shipwright; had never seen the Ellen Tobin. A general description being given to him, he said he thought he would put her fair and reasonable value at about \$10 a ton (p. 643, fols. 1154, 1155).*

*Johnson, one of the assessors of the District of Columbia, who had not been interested in any vessel over 300 tons, and who had never taken any particular notice of the Ellen Tobin, but had seen her on the railway and going down the river, thought she might be worth from \$4,000 to \$5,000 (pp. 648, 649).*

*The valuation put upon the vessel by the seven of these witnesses who alone give any estimate of her value, varies from \$2,500 to \$5,000. Their testimony is not based upon any particular knowledge of the vessel herself. The more intelligent among the witnesses, especially Crowell and Martin—Crowell, who valued her at \$3,200, and Martin, who valued her at \$4,130—were engaged in the business of valuing vessels for underwriters. The very nature of their business was such as to incline them*

to low valuations. Such witnesses are always very conservative in the matter of value. But applying one of the rules which *Mr. Martin* said prevailed among the underwriters, to the *Ellen Tobin*, namely, that a vessel kept in good condition was worth a quarter of her original cost after twenty years, her valuation would be something over \$7,500. He also frankly admitted that he could not give any estimate of what she would have been worth if substantially new. This seems to show that he was not well acquainted with the market value, because if any kind of vessel has a market value it would seem to be new vessels of a particular class.

The witness *Clarridge*, who put the lowest value upon her, \$2,500, seems to have been very unfortunate himself as a vessel owner about that time. He says he got no profits out of vessels. Comparing him with the other witnesses called by the appellants, his judgment seemed to be very much affected by that circumstance.

The witness *Gilkie*, who had no special knowledge of the market for vessels, makes the very absurd answer on the subject of value: "For me she would not be worth anything, only what she would be struck down for at a sale of old junk, but she might bring \$3,000 possibly." He also underestimates the probable cost of such a vessel at the time he testified, at \$18,000, which is not supported by the testimony, and he very frankly says that he only knew the value in 1893 in a general way, and not from having any actual transaction in vessels of her class (*p. 638, fol. 1146*).

The witness *Jones*, a shipwright, had had no dealings in or known of no dealings in vessels of her class, but only of smaller vessels.

The details with regard to the vessels of whose sale he did know in Brooklyn are not sufficient for the purpose of a comparison between those vessels and the "*Tobin*."

The witness *Johnson*, who valued her at from

\$4,000 to \$5,000, also had special experience in smaller vessels.

While the general rule is admitted to be that the value to be shown is *the market value, provided the vessel is of a class which has a market value* (The "*Baltimore*," 8 Wall., 377), yet ships have an individuality, and even if there is something approaching a standard market value for ships of a particular kind, it is seldom that two vessels bought and sold are exactly alike, and there is room for considerable difference of opinion among witnesses upon the question of even the market value of a particular vessel. The evidence is not very clear in this case that in 1893 there was what could be called a standard of value or market value for vessels like the "*Ellen Tobin*," especially for that kind of a vessel of her age.

The question of value seems to have received very full consideration in the courts below, and is one peculiarly fit for the determination of the trial Court. In this case the trial Judge, not being satisfied with the conclusion and rulings of the auditor, took the testimony of some of the witnesses in open court on this question of value. The Court was not bound to accept the valuation of any witness, and did not decide in favor of the extreme views of either party. The Court may be deemed to have taken into consideration the natural bias which many of the witnesses for the appellants, acting in the ordinary course of their business for insurance companies, would have in favor of low valuations; and upon the whole evidence the final conclusion of the Court that the vessel was worth \$8,000 is fully sustained by the proofs taken on the reference.

There was, however, other evidence of her value in the record. Several competent witnesses had also testified, on the original hearing, to a value of \$10,000 without objection (*Kensel*, p. 128, fol. 214; *Davey*, p. 182, fol. 315; *Barnett*, pp. 185, 186, fol. 321).

Another witness testified to the same value under objection. As his valuation was based on his



knowledge of the vessel two years before, that would seem to have been the ground of objection (*Gokey*, p. 134, fol. 226).

3. The Court properly allowed the expense actually incurred in removing the cargo, less the \$100 received by the owners on her sale, and receipts for boat, &c. The statute hereinbefore referred to made it the duty of the owner to remove the wreck, and the appellees, after inquiry on the part of their counsel, were so advised (*Hagner*, p. 174).

The removal of the vessel itself cost the owners nothing, but it could not be effected till after the cargo had been taken out.

This statute seems to have made it equally incumbent upon the appellants, who were the cause of the stranding of the vessel, to remove her. This expense was clearly a part of the damage sustained by the appellees and rightly included in the decree.

It seems also that the owner would have been liable for any possible damage that might have happened from the vessel breaking up or being carried away and doing damage to the bridge or to other vessels (*Hagner*, p. 254). And this liability also justified them in removing the cargo and providing for the removal of the vessel.

### III.

*The cross-libel was properly dismissed, first, for want of proof of the allegations of negligence, and, secondly, because the statute equally imposes the duty upon the appellants by whose act and negligence the wreck was caused. It was their own fault that their business was interfered with.*

## IV.

*The rule was well settled when this Court was in the habit of hearing appeals in admiralty cases, that where both of the Courts below concurred in their conclusions of fact, the burden was upon the appellant to make out clearly that such findings were without evidence or were clearly against the weight of evidence.*

*The "Baltimore,"* 8 Wall., 382.

*The "Lady Pike,"* 21 Wall., 8.

*The Ship "Marcellus,"* 1 Black, 417.

*With this rule has gone along another rule, that where the facts found below and concurred in by both Courts have been found upon conflicting evidence, this Court would not reverse if there was evidence to support the decree. Thus in the Philadelphia, Wil. & Balt. Ry. Co. v. Phila. & Havre de Grace Steamboat Co., 23 Howard, 217, the Court say:*

*"Some objections have been urged to the assessment of damages and their amount. On this subject there was much contradictory testimony, as usually happens when experts are examined as to matters of professional opinion. The judges of the courts where this question was tried, can better judge of the relative value of such conflicting testimony, from their knowledge of the places and persons, and they may examine witnesses *ore tenus* if they see fit. There was evidence to support the decree, and we can see no manifest error into which the Court below has fallen. Appellants ought not to expect that this Court will reverse a decree merely upon a doubt created by conflicting testimony."*

And in the case of *The S. B. Wheeler*, 20 Wall., 386, the Court say:

“Questions of fact only are presented by this appeal. There is no dispute as to the law. Two courts have already found against the appellants. It has been over and over again ruled by this Court that under such circumstances the burthen is on the appellant to show the error. Every presumption is in favor of the decrees below. We ought not to reverse unless the error is clear. Such is not the case here. It is indeed urged that the claimants, by their own proof, established the fact that there was no lookout at the bow of the *Wheeler* when the collision occurred. This is so, but whether that was a contributing fault was a question of fact, and that has been twice found against the appellants. We are entirely satisfied with all the findings.”

In the present case the evidence was conflicting upon every issue of fact involved in the controversy. There was evidence to sustain every fact found by the courts below and, upon the application of the foregoing authorities, the appellants have not sustained the burthen that is upon them as regards the facts. This is true of the question of contributory negligence of the vessel as well as of the question of the negligence of the appellants.

## V.

*There having been no findings of fact by the Court of Appeals, this Court cannot consider or enquire into the facts, but has only to determine whether upon the record there is error.*

By the 8th section of the Act of February 9, 1893, creating the Court of Appeals of the District of Col-

umbia (27 *Stats.*, 434), "any final judgment or decree of the Court may be re-examined and affirmed, reversed or modified by the Supreme Court of the United States, upon writ of error or appeal in all causes in which the matter in dispute exclusive of costs shall exceed \$5,000, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia."

By Section 10 of the same Act the opinion of the Circuit Court of Appeals was to be in writing and filed as part of the record.

By Section 11 of the Act of March 3, 1863 (12th *Stats.*, Chap. 91, p. 764), establishing the new court to be known as the Supreme Court of the District of Columbia, it was provided "that any final judgment, order or decree of said Court may be re-examined, reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal in the same cases and in like manner as is now provided by law in reference to the final judgment, orders and decrees of the Circuit Court of the United States for the District of Columbia."

The Act of February 27, 1801, (2 *Stats.*, Ch. 15, p. 103), which established a Circuit Court of the District of Columbia and provided that the said court and the Judges thereof should have all the powers by law vested in the Circuit Courts and the Judges of the Circuit Courts of the United States, gave the Court jurisdiction only of suits of a civil nature at common law or in equity, of crimes and offenses committed within the District, of seizures on land and water, and of penalties and forfeitures made arising or accruing under the laws of the United States. It gave no jurisdiction in admiralty. It provided, however, in Section 8, that "any final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of \$100, may be re-exami-

“ined and reversed or affirmed in the Supreme  
 “Court of the United States by writ of error or ap-  
 “peal, and shall be prosecuted in the same manner  
 “under the same regulations, and the same pro-  
 “ceedings shall be had as is or shall be provided in  
 “the case of writs of error on judgments or appeals  
 “upon orders or decrees rendered in the Circuit  
 “Court of the United States.”

By the 24th section of the act to amend the judicial system of the United States, passed on the 29th day of April, 1802 (2 *Stats. Ch.*, 31, *Sec.* 24, *p.* 166), the Chief Judge of the District of Columbia was authorized to hold a District Court of the United States in and for said District with the same powers and jurisdiction vested in the district courts of the United States. And the admiralty jurisdiction thus granted was continued in the Supreme Court of the district by the Act of 1863, § 3, to be held by any one of the Justices (12 *Stat.*, *p.* 763).

From these statutes it will appear that from 1802 to 1863 writs of error and appeals from the Circuit Court of the District to this Court were to be taken in the same manner and under the same regulations, and the same proceedings to be had therein as was from time to time provided in the case of writs of error upon judgments or appeals from orders or decrees rendered in the circuit courts of the United States. The language of the statute is “*the same as is or shall be provided.*” It made appeals and writs of error conform from time to time to the changes in the law relating to the Circuit Courts, but by the Act of 1863 the provision was altered and these proceedings were subject only to such provisions as at the date of the passage of the Act of March 3, 1863, were provided in cases of the Circuit Courts of the United States. But when the statutes of the United States were revised in 1874 the language was again altered. The revised statute took effect *June* 22, 1874, and Section 705 provided as follows:

"The final judgment or decree of the Supreme  
 "Court of the District of Columbia in any case  
 "where the matter in dispute, exclusive of costs,  
 "exceeds the value of \$1,000 may be re-examined  
 "and reversed or affirmed in the Supreme Court of  
 "the United States, upon writ of error or appeal,  
 "in the same manner and under the same regula-  
 "tions as are provided in cases of writs of error on  
 "judgments, or appeals from decrees rendered in a  
 "circuit court."

The word "*now*," which occurred in the Act of 1863 was omitted. The Act of 1863 made the practice in this regard, as it existed on the day of the passage of that act a permanent regulation. It is quite obvious that the intention of Section 705 of the Revised Statutes was to alter this provision. The object of the change apparently was to assimilate the practice in this respect of the Supreme Court of the District of Columbia to that of the Circuit Courts of the United States with which, up to 1863, the practice had always been assimilated.

While the language is not as explicit as that of the Act of 1802, it is sufficient. The acts establishing the Circuit Court of the District of Columbia, and the subsequent court, the Supreme Court of the District of Columbia, had provided as to jurisdiction and the powers of the Judges, that they should in general be the same as the powers of the Circuit Courts of the United States and of the Judges of those courts. There was no reason for fixing upon a particular point of time, March 3, 1863, as a period for establishing a method of practice which should be fixed and unalterable. Nor does Section 705 of the Revised Statutes show any such purpose with regard to the period at which the Revised Statutes took effect March 18, 1874. Every reason which required a change in the practice in the Circuit Courts of the United States would apply with equal force to the Supreme Court of the District of Columbia in respect to appeals and writs of error, and this is a

reasonable construction of Section 705 of the Revised Statutes.

If this view is correct then when by the act of February 16, 1875 (18 *Stats.*, 315), the Circuit Courts of the United States in deciding admiralty causes were required to make separate findings of fact and law and it was provided that on appeal to the United States Supreme Court the review should be limited to questions of law appearing on the record or presented by a bill of exceptions, this law became applicable to the Supreme Court of the District of Columbia as then organized, and the provision in the act of February 9, 1893, establishing the Court of Appeals of the District, that the final judgments and decrees of the Court of Appeals might be re-examined and affirmed, reversed or modified in the Supreme Court of the United States upon writ of error or appeal, &c., in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia made it necessary that the Court of Appeals of the District of Columbia should make findings of fact in order to enable this Court to review its decrees on questions of fact.

In the case *In re Cooper* (143 U. S., 511) it was held that the requirement of the Act of 1875, requiring findings applied to the District Court of Alaska, established under the Act of May 17, 1884 (23 *Stats. Ch.*, 53, p. 24). That act contains this provision:

“ Writs of error in criminal cases shall issue to  
 “ the said District Court from the United States  
 “ Circuit Court for the District of Oregon in the  
 “ cases provided in Chap. 176 of the Laws of 1879,  
 “ and the jurisdiction thereby conferred upon Circuit  
 “ Courts is hereby given to the Circuit Court of  
 “ Oregon, and the final judgments or decrees of said  
 “ Circuit and District Court may be reviewed by the  
 “ Supreme Court of the United States *as in other*  
 “ *cases.*”

The Court interpreted these words "Circuit Court and District Court" to mean the Circuit Court of Oregon and the District Court of Alaska, so that the language was interpreted to read, "And the final judgments or decrees of the said District Court of Alaska may be reviewed by the Supreme Court of the United States *as in other cases.*"

The act establishing the Circuit Courts of Appeals, being the Act of March 3, 1891 (26 *Stats. Ch.*, 517, p. 826), does not affect this question. It abrogated the provision of the Act of 1875, requiring findings to be made by the Circuit Courts of the United States, so far as applied to the Circuit Court of Appeals by making their decision in admiralty cases final, and these new courts were not within the terms of the Act of 1875, not being circuit courts of the United States. By giving an appeal from the District Court to the Circuit Courts of Appeal and making the decisions of the Circuit Courts of Appeal in admiralty cases final, the law of 1875, so far as the requirement of findings of fact was concerned, became inoperative in respect to the Circuit Courts of the United States in admiralty cases. They no longer had jurisdiction in admiralty cases.

By Section 14 of the Act of 1891 there is an express repeal of Section 3 of the Act of 1875. This express repeal of Section 3 would seem to imply that Sections 1 and 2, so far as they could still have force and apply to any existing courts, still remained in force, and if by reason of the statutes hereinbefore referred to the statute of 1875 was the law applicable to the Court of Appeals of the District of Columbia it is still a law as applied to that Court notwithstanding the Act of 1891—and it would seem that it still applies to appeals in admiralty from the District Court of Alaska.

In *Pioneer Fuel Co. v. McBrier*, 84 Fed. Rep., 496, Mr. Justice Brewer considered, without deciding the question, whether, since the Act of 1891, the Act of 1875 required findings by a District Court for the purposes of an appeal to the Circuit Court of



Appeals, and in the discussion he refers to the express repeal of the third section as bearing on the question of an implied repeal of other sections of the Act of 1875. He also says: "The purpose of the Act of 1891 was to distribute between the Supreme Court and the newly formed Courts of Appeal, the entire appellate jurisdiction from the Circuit and District Courts of the United States, and not to provide new modes of procedure." There have been a number of cases in the Courts of Appeal determining that for the purpose of an appeal in Admiralty from the District Courts to the Circuit Courts of Appeal, and also for the purpose of an appeal from the Circuit Courts of the United States to the Circuit Courts of Appeal, in the limited number of cases where the Circuit Courts had pending before them Admiralty appeals from the District Courts when the Act of 1891 took effect, the Act of 1875 did not require findings. But these cases seem to have little or no bearing on the present question. As to both those classes of cases it was apparent that they were not within the scope or reason of the Act of 1875, which was designed to regulate appeals from the Circuit Courts to this Court.<sup>(a)</sup> (*The Havilah*, 48 Fed. Rep., 684; *The State of California*, 49 Fed. Rep., 172; *The E. A. Packer*, 58 Fed. Rep., 252; *The Philadelphia*, 60 Fed. Rep., 425; *The Coquiltam*, 77 Fed. Rep., 748; *Nelson v. White*, 83 Fed. Rep., 218; *Pioneer Fuel Co. v. McBrier*, *ut supra*, 84 Fed. Rep., 497.) As there was every reason why the practice of the Court of Appeals of the District of Columbia should be assimilated in this matter to that of the Circuit Courts of the United States, and that that statute of 1875 should apply to the Court of Appeals of the District of Columbia, there is every reason why, if consistent with the Act of 1891, the requirement for findings should continue in force in respect to the Court of Appeals of the District of Columbia, and this Court should have the benefit of findings of fact intended by the Act of 1875 to relieve this Court of the labor of

(a) "An Act to facilitate the disposition of cases in the Supreme Court of the U.S., and for other purposes".

going through these immense records in admiralty cases for the purpose of ascertaining the facts. This Court has several times called attention to the fact as entitled to weight in the construction of the Act of 1891,—that one of its principal purposes was to relieve this Court of excessive labor (*McLish v. Roff*, 141 U. S., 666; *Lau Ow Bew v. U. S.*, 144 U. S., 55; *Amer. Const. Co. v. Railway*, 148 U. S., 382). It would be a strange construction of the Act of 1891, designed to relieve this Court of such labor, that the effect should be in respect to appeals from any court that its labors of this very kind should be greatly increased. Such construction is not necessary, so far as this question is concerned.

Where the law requires a finding of fact to be made by the Court below and such findings are not made, the Court will not send the case back for findings, unless it appears that the want of findings was the fault of the Court itself, and this Court will proceed to determine the cause upon the record. In such cases it is presumed that the parties did not desire findings but desired to have their appeal heard upon the record alone.

*The S. S. Osborne*, 104 U. S., 183.

## VI.

*The decrees of the Supreme Court of the District of Columbia sitting as a Court of Admiralty and of the Circuit Court of Appeals should be affirmed, with costs to the appellees.*

WM. G. CHOATE,  
Of Counsel for Appellees.

SMITH *v.* BURNETT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF  
COLUMBIA.

No. 112. Argued January 6, 9, 1899. — Decided March 13, 1899.

Undoubtedly there was jurisdiction in admiralty in this case, in the courts below.

Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the conditions of the berths thereat, and, if there is any dangerous obstruction, to remove it, or to give due notice of its existence to vessels about to use the berths; at the same time the master is bound to use ordinary care, and cannot carelessly run into danger.

This court is unable to decide that the Court of Appeals of the District of Columbia was not justified in holding, on the evidence, that appellants were liable for negligence and want of reasonable care, and that the master was free from contributory negligence, and therefore affirms the decree of the Court of Appeals which agreed with the trial court on the facts.

## Statement of the Case.

THIS was an appeal from the Court of Appeals for the District of Columbia affirming a decree of the Supreme Court of the District, sitting in admiralty, whereby appellees, original libellants in the cause, were awarded damages, and a cross libel filed by appellants was dismissed. 10 D. C. App. 469. As stated by the Court of Appeals, the libel was filed by appellees against appellants for an alleged injury to their vessel, the schooner *Ellen Tobin*, while moored in berth at appellants' wharf on the bank of the Potomac at Georgetown, for the purpose of being loaded by and for appellants; and the injury complained of was averred to have been occasioned by appellants negligently allowing a dangerous rock to remain in the bed of the river within the limits of the berth at the wharf, which the vessel was invited to take, the obstruction being unknown to the master of the vessel, and he having been moreover assured by appellants through their agent that the depth of water in the berth in front of the wharf was sufficient and that the berth was safe for the loading of the vessel.

The facts, in general, found by that court were: That appellants were lessees of wharf and water rights extending to the channel of the river, and the berth assigned to and taken by the schooner for the purpose of loading was in front of their wharf and within the leased premises; that appellants were engaged in the business of crushing and shipping stone from the wharf to different points; and that the schooner had been brought up the river by prearrangement with a ship broker in Georgetown in order to be loaded by appellants at their wharf with crushed stone to be taken to Fortress Monroe, in Virginia, to be used in government work at that place. That the vessel was staunch and in good repair; was a three masted schooner of six hundred tons capacity; was registered at the New York custom house as a coasting vessel of the United States, and was owned by appellees at the time of the injury complained of. It was further found "that the vessel was sunk on [Sunday,] the 6th of August, 1893, as she was moored in the berth at the wharf, while receiving her cargo of crushed stone from the wharf, by means of a chute extended from the wharf to the hatchway of the vessel. The vessel

## Opinion of the Court.

was about two thirds loaded, having received about four hundred tons of her cargo, before signs were discovered of her distressed condition. She was then taking water so rapidly that the pumps could not relieve her, nor could the extra assistance employed by the master avail to save her from breaking and sinking in the berth. The work of loading was stopped on Saturday evening, with the intention of resuming the work of loading on the following Monday morning; and the captain of the vessel, at the time of stopping work on Saturday, made soundings around the vessel and supposed that she was then lying all right. But on Sunday morning it was discovered that there was so much water in her that she could not be relieved by her pumps; and by 5 o'clock on the afternoon of that day she had filled with water, and broke in the middle, and sank in her berth, where she remained, with her cargo under water, until the 1st of November, 1893, when the stone was pumped out of her, and she was then condemned as worthless, and was afterwards sold at auction for \$25 to one of the owners." Other findings of fact appeared in the opinion.

Appellants denied all negligence, and insisted that they were in no way responsible for the disaster; and in a cross libel asserted a claim for damages caused by the fault of appellees in allowing the vessel to sink in the river in front of their wharf and to remain there for an undue time. The evidence was voluminous and conflicting.

*Mr. R. D. Benedict* for appellants. *Mr. James S. Edwards*, *Mr. Job Barnard* and *Mr. Nathaniel Wilson* were on his brief.

*Mr. William G. Choate* for appellees.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

Undoubtedly there was jurisdiction in admiralty in the courts below, and the applicable principles of law are familiar.

## Opinion of the Court.

Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound to use ordinary care, and cannot carelessly run into danger. *Philadelphia, Wilmington &c. Railroad v. Philadelphia &c. Steam Towboat Co.*, 23 How. 209; *Sawyer v. Oakman*, 7 Blatchford, 290; *Thompson v. N. E. R. R. Company*, 2 B. & S. 106; *S. C. Exch.* (1860,) 119; *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Carleton v. Franconia Iron and Steel Company*, 99 Mass. 216; *Nickerson v. Tirrell*, 127 Mass. 236; *Barber v. Abendroth*, 102 N. Y. 406.

*Carleton v. Franconia Iron and Steel Company*, 99 Mass. 216, is so much in point that we quote from it, as did the Court of Appeals. The case was in tort for injury to plaintiffs' schooner by being sunk and bilged in the dock adjoining defendants' wharf which fronted on navigable waters, where the tide ebbcd and flowed. Defendants had dredged out the adjoining space to accommodate vessels which were accustomed to come with iron and coal for defendants' foundries, situated on the wharf. There was in the space dredged a large rock, sunk in the water and thereby concealed from sight, dangerous to vessels, and so situated that a vessel of the draft to which the water at the wharf was adapted, being placed at high water at that part of the wharf, would lie over the rock, and at the ebb of the tide would rest upon it. Defendants had notice of the existence and position of the rock and of its danger to vessels, but neglected to buoy or mark it or to give any notice of it to plaintiffs or any one in their employment, though their vessel came to the wharf by defendants' procurement, bringing a cargo of iron for them under a verbal charter. Mr. Justice Gray, among other things, observed:

"It does not indeed appear that the defendants owned the soil of the dock in which the rock was embedded; but they had excavated the dock for the purpose of accommodating vessels bringing cargoes to their wharf; and such vessels were

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accustomed to occupy it, and could not discharge at that point of the wharf without doing so. . . . Even if the wharf was not public but private, and the defendants had no title in the dock, and the concealed and dangerous obstacle was not created by them or by any human agency, they were still responsible for 'an injury occasioned by it to a vessel which they had induced for their own benefit to come to the wharf, and which, without negligence on the part of its owners or their agents or servants, was put in a place apparently adapted to its reception, but known by the defendants to be unsafe. This case cannot be distinguished in principle from that of the owner of land adjoining a highway, who, knowing that there was a large rock or a deep pit between the travelled part of the highway and his own gate, should tell a carrier, bringing goods to his house at night, to drive in, without warning him of the defect, and who would be equally liable for an injury sustained in acting upon his invitation, whether he did or did not own the soil under the highway."

And as to the degree of care required of the master or vessel owner, the same court in *Nickerson v. Tirrell* rightly said: "The true rule was stated to the jury, that the master was bound to use ordinary care, and could not carelessly run into danger. We cannot say, as matter of law, that he was negligent because he did not examine or measure the dock and berth. It was for the jury to determine whether the conduct and conversation of the defendant excused the master from making any more particular examination than he did make, and whether, upon all the evidence, he used such care as men of ordinary prudence would use under the same circumstances."

The cases necessarily vary with the circumstances. In *The Stroma*, 42 Fed. Rep. 922, the libellant sought to recover damages received by its steamer, while moored alongside respondent's pier, by settling, with the fall of the tide, on the point of a spindle, part of a derrick attached to a sunken dredge. Work was proceeding for the removal of the dredge, and several buoys had been set to indicate the place of its several parts. The agent of the steamer knew of the location of the wreck;

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sought permission to moor outside of it; and undertook to put the ship in position. The liability to danger was as well known to the steamer as to the wharfinger, who made no representation and was free from negligence. The libel was dismissed, and the decree was affirmed by this court. *Panama Railroad Company v. Napier Shipping Company*, 166 U. S. 280.

In *The Moorcock*, 13 P. D. 157, defendants, who were wharfingers, agreed with plaintiff for a consideration to allow him to discharge his vessel at their jetty which extended into the river Thames, where the vessel would necessarily ground at the ebb of the tide. The vessel sustained injury from the uneven condition of the bed of the river adjoining the jetty. Defendants had no control over the bed, and had taken no steps to ascertain whether it was or was not a safe place for the vessel to lie upon. It was held that, though there was no warranty, and no express representation, there was an implied undertaking by defendants that they had taken reasonable care to ascertain that the bottom of the river at the jetty was not in a condition to cause danger to a vessel, and that they were liable. The judgment was sustained in the Court of Appeal, 14 P. D. 64, and was approved by the House of Lords in *The Calliope*, (1891) App. Cas. 11, though in the latter case it was ruled, on the facts, that there was no sufficient evidence of any breach of duty on the part of the wharfingers, and that the injury to the vessel was caused by the captain and pilot attempting to berth her at a time of the tide when it was not safe. The berth was in itself safe, but it was held that, under the particular circumstances disclosed by the proofs, the ship owner had assumed as to the approaches the risk of reaching the berth; while the general rule in respect of the duty of wharfingers was not questioned. The Lord Chancellor remarked: "In this case the wharfinger, who happens to be the consignee, invites the vessel to a particular place to unload. If, as it is said, to his knowledge the place for unloading was improper and likely to injure the vessel, he certainly ought to have adopted one of these alternatives: either he ought not to have invited the



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vessel or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided." Lord Watson: "I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay." And Lord Herschell: "I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned judges in the cases which have been cited to us, with the condition of the bed of the river in itself dangerous—that is to say, which is such as necessarily to involve danger to a vessel coming to use a wharf in the ordinary way; and we are not dealing with a case of what I may call an abnormal obstruction in the river—the existence of some foreign substance or some condition not arising from the ordinary course of navigation."

We are remitted then to the consideration of the facts, and as to them the rule is firmly established that successive decisions of two courts in the same case, on questions of fact, are not to be reversed, unless clearly shown to be erroneous. *Towson v. Moore*, 173 U. S. 17; *The Baltimore*, 8 Wall. 377, 382; *The S. B. Wheeler*, 20 Wall. 385, 386; *The Richmond*, 103 U. S. 540. And when the evidence is conflicting, there being evidence to sustain the decree, this court will not ordinarily interfere.

Tested by this rule we must assume on the record that the vessel in question was chartered by appellants, through a ship

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broker duly authorized, for the purpose of being loaded with a cargo of crushed stone, which would be about six hundred tons, by appellants at their wharf, to be discharged at Fortress Monroe; that the contract, which was oral, did not expressly name the number of tons to be loaded, nor guarantee the depth of water, nor the position of the vessel at the wharf, nor embody as part thereof the representations alleged to have been made in respect of the depth of the water; that there was a ridge of rock in the berth assigned to the vessel by appellants, projecting above the bottom of the river and endangering her safety, even when only partially loaded; and that the vessel, though staunch, strong and seaworthy, was wrecked by grounding on that rock.

We also think that the conclusions of the Court of Appeals, set forth in its opinion, that no ordinary skill or effort on the part of the master or owners could have been exercised effectively to save the vessel from total loss, and that the injury was not increased, nor the damages enhanced, by delay in attempting to raise and remove the vessel, cannot reasonably be questioned; and that we are not required to pass on the conflicting evidence in respect of the value of the vessel at the time of the injury. In other words, it must be held that the cross libel was properly dismissed, and that the amount of damages awarded is not open to inquiry.

As to knowledge or notice of the obstruction by appellants, the evidence tended to show that they had been for some years in the use of the wharf and of this particular berth; that they had under lease perhaps two and a half miles of river front, containing stone quarries, some of which they were working; that their business was large, and that during the year 1893, before the accident, they had loaded from fifteen to twenty vessels at the same place; that the capacity of the crusher for loading vessels through the chute was from one hundred and fifty to two hundred tons a day; that they employed from one hundred and fifty to three hundred men, and at times many more, and had bins into which they ran crushed stone to be carried off in various ways. It further appeared that in December, 1892, the two masted schooner

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Baird, carrying five hundred tons, and when loaded drawing fourteen feet, grounded in the same berth, manifestly on a rock, and that that fact and the character of her injuries were known to appellants. There was much other evidence bearing on this point of knowledge or notice, which fully sustained the Court of Appeals in its conclusion that appellants knew of the existence of the rock, and its dangerous nature; or, if not, that absence of investigation amounted, under the circumstances, to such negligence as to impute notice.

But the stress of the argument is that the master was guilty of negligence which contributed to the injury, and chiefly in not ascertaining the condition of the bottom of the berth and taking precautions, as advised. Yet on this, as on other branches of the case, the evidence was conflicting, and we cannot say that the finding of the Court of Appeals that the evidence failed to establish "that there was want of due care on the part of the master, and a failure to exercise proper supervision for the safety of the vessel, while she was moored at the wharf for the purpose of being loaded," was clearly erroneous. The master came to the berth on appellants' business; and there was evidence to the effect that the broker, with whom the engagement was made, and appellants' foreman were both informed that the vessel would draw when loaded from fourteen to fourteen and one half feet, and that the master was assured by both that there was plenty of water; that the berth had been dredged out to between fourteen and fifteen feet; and that there was fourteen feet "sure at low water." The evidence also tended to show that the foreman suggested on Friday to the master to make some soundings for himself; that there might have been something dropped over from a lighter that he did not know of; that the captain did make soundings and found sufficient water as the vessel then lay; that one of the appellants told the foreman "to tell the captain of the Tobin that he had better sound around the vessel and make sure that it was laying all right;" that the foreman "said the vessel was laying all right, but he would tell the captain," as he afterwards reported he had; that the captain sounded around the vessel on Saturday

## Syllabus.

and discovered no dangerous condition; that the vessel did not commence leaking until Sunday morning; and that the master thereupon did all he could to save her. It does not appear that the master was informed that the bottom was a rock bottom, or that the fact was mentioned that the Baird had previously got on an obstruction in the berth; and there was nothing in what was said to lead the captain to suppose that there was danger provided there was water enough around the vessel. He rather thought the vessel touched bottom on Saturday evening at low tide, but that, if so, did not in itself constitute cause for alarm. In fact, the danger was the existence of the rock in the middle of the berth under the vessel. The evidence is voluminous in respect of the extent and manner of the loading; of what passed between the parties; of the different soundings, and so on; but it is unnecessary to recapitulate it, as we are satisfied that no adequate ground exists for disturbing the result reached.

At all events, we are unable to decide that the Court of Appeals was not justified in holding on the evidence that appellants were liable for negligence and the want of reasonable care, and that the master was free from contributory negligence; and the decree must, therefore, be

*Affirmed.*